Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 1994

NICHOLAS E. TAVAGLIONE,

Respondent,

v.

MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, ROY E. WHITEHEAD, and RIVERSIDE NATIONAL BANK,

Petitioners.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME 1 OF 3

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APPENDIX A

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

FILED
OCT 17 1993
COURT OF APPEAL FOURTH DISTRICT

NICHOLAS E. TAVAGLIONE, Plaintiff and Respondent,	)	E006746
v.	)	(Super.Ct.No. R-187341)
MICHAEL C. BILLINGS, et al.,	)	
	)	**O P I N I O N**
Defendants and Appellants.	)	
	)	

APPEAL from the Superior Court of Riverside County. John P. Carroll, Judge. Affirmed.

Haight, Brown & Bonesteel, Roy G. Weatherup and Rita Gunasekaran for Defendants and Appellants.

Miller, Boyko and Bell, Roy Morrow Bell and Fletcher W. Paddison for Plaintiff and Respondent.

Michael C. Billings, Maryann Archambault, J. Richard Swartz, Roy E. Whitehead, and Riverside National Bank, defendants and appellants (hereinafter collectively referred to as defendants) appeal from the judgment in favor of Nicholas Tavaglione, plaintiff and respondent (hereinafter, plaintiff) entered following a lengthy jury trial, prosecuted by plaintiff on various theories of recovery, in which the jury returned a general verdict with special interrogatories awarding plaintiff

compensatory damages of $2,254,787 against all defendants, jointly and severally, and further awarding punitive damages of $130,000 against defendant Billings and $2,300,000 against defendant Riverside National Bank.[1] Defendants, in pursuing this appeal, raise numerous and extensive claims of error in their 119-page opening brief,[2] purportedly challenging every aspect of the judgment.

In our original disposition of this appeal, we affirmed the entire judgment concluding, for various reasons, that the jury's responses to the damage special interrogatories included in the general verdict form did not test the validity of the jury's general damage verdict and, therefore, were meaningless. As a result, we viewed the verdict as a general verdict both with respect to liability and damages. We, therefore, applied the general verdict rule and concluded the entire general damage verdict of $2,254,787 was supported by the jury's finding of liability under the defamation cause of action, even though the jury's response to the damage special interrogatory in connection with the defamation cause of action attributed only $604,787 of the total general damage verdict to that cause of action. Consequently, we did not address each of defendants' numerous claims of error but, instead, addressed only those claims which pertained, directly or indirectly, to plaintiff's recovery under the defamation cause of action. In

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[1] In accordance with the instructions contained in the "General Verdict with Special Interrogatories" submitted by the parties (discussed, in detail, below) the jury allocated the compensatory damage award among the various defendants. The trial court, recognizing liability of the defendants was joint and several, corrected the verdict, accordingly.

[2] All references to defendants' opening brief are to the "Corrected" opening brief filed by defendants on February 28, 1992, in response to our order dated January 31, 1992, advising defendants of their failure to include citations to the record as required by rule 15(a) of the California Rules of Court.

addition, we noted significant procedural deficiencies in defendants' opening brief as a result of which we declined to address various issues arguably pertinent to plaintiff's recovery under the defamation cause of action based on our conclusion defendants had not properly demonstrated error occurred in the trial court.

The Supreme Court reversed our judgment. In doing so, the court noted, among other things, that the jury's responses to the damage special interrogatories disclosed the jury's "determination that plaintiff was damaged in varying amounts by defendants' tortious activities," therefore, "only a portion (namely, $604,787) of the general verdict of $2,254,787 may be deemed to constitute damages attributable to defamation. (Tavaglione v. Billings (1993) 4 Cal.4th 1150, 1157.) The Supreme Court instructed that while plaintiff "is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence . . . where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories." (Tavaglione v. Billings, supra, 4 Cal.4th at pp. 1158-1159.) Based on the foregoing principles, the Supreme Court concluded this court "misapplied the general verdict rule" and, therefore, "did not review the jury's responses" to the special interrogatories (other than those involving the defamation claim) to determine whether: (1) they were free from prejudicial error, (2) they were supported by substantial evidence, and (3) they were based on separate items of compensable damage so as to justify aggregating them in computing the total damage amount of the judgment. In order to sustain the judgment against defendants in the stated amount, the Court of Appeal was required to review and uphold a sufficient number of separate damage findings which, when combined, equalled or

exceeded the amount of the judgment. (Tavaglione V. Billings, supra, 4 Cal.4th at p. 1159.) The Supreme Court further held this court was "free to dispose of the remaining appellate issues [raised by defendants but not addressed by this court] on whatever grounds, procedural or substantive, [this] court deems appropriate." (Ibid.)

In accordance with the Supreme Court's instructions, we shall review and uphold a sufficient number of separate liability and damage findings which, when combined, equal or exceed the amount of the $2,254,787 judgment. We conclude, as we shall explain, that the judgment is supported by the jury's responses to the special interrogatories, regarding both liability and damages, in connection with plaintiff's second cause of action for defamation and fourth cause of action for breach of the implied covenant of good faith and fair dealing. The jury's liability and damage findings in connection with those two causes of action, in our view, are (1) free from defendants' claims of prejudicial error, (2) supported by substantial evidence and, (3) based on separate items of compensable damage so as to justify aggregating them in computing the total amount of the judgment. The jury awarded plaintiff damages of $604,787 and $1,650,800, respectively, on those two theories of recovery. Those amounts, when aggregated, total $2,255,587 and, therefore, exceed the $2,254,787 judgment. Accordingly, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The facts underlying this appeal essentially are not in dispute.[3] The board of directors of Riverside National Bank

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[3] In view of the voluminous record on appeal, consisting of 13 volumes of Joint Appendix in Lieu of Clerk's Transcript and 16 volumes of Reporter's Transcripts, and because, as above noted, the underlying facts essentially are not disputed, we take our statement of facts from plaintiff's First Amended Complaint.

("RNB"), of which plaintiff and the individually named defendants were members, adopted a bylaw at a special board meeting held February 26, 1987, which disqualified anyone in default for more than 30 days on a loan from any financial institution from serving on the board of directors.[4] Under the terms of the bylaw, if the default for more than 30 days occurred during the term of a director, that director "shall be disqualified to continue to serve as a director . . . and such person shall be deemed to have vacated his place on the Board of Directors . . . as of the date" of the 30-day default, however, the disqualified director "may be considered for appointment as a director at a future date which is at least one year after the default which gave rise to such disqualification has been cured."

Plaintiff, the single largest shareholder of RNB and an elected member of the board of directors since 1974, had loans from RNB which purportedly were in default for more than 30 days as of the date the board adopted the bylaw. Plaintiff allegedly was not given notice of the special meeting at which the bylaw was amended (see fn. 4, above) and, therefore, apparently was not present and did not participate in that action of the board. Pursuant to the newly adopted bylaw, the board of directors notified plaintiff, by certified letter dated February 26, 1987, that plaintiff did not meet the newly adopted qualifications for board members. Therefore, the board advised plaintiff that he was "disqualified to continue to serve as a director" and was "deemed to have vacated [his] place on the Board of Directors as of February 26, 1987."

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[4] The board of directors originally adopted the bylaw at a regularly scheduled monthly board meeting held February 18, 1987. Because of a perceived ambiguity in the language of the bylaw as initially adopted, which arguably created a 30-day period in which to cure a default, the board held a special meeting on February 26, 1987, to amend the bylaw and eliminate the purportedly ambiguous language.

Thereafter, in March of 1987, two articles pertaining to the board's action appeared in the local newspaper. One such article, which quoted defendant Swartz, identified in the article as RNB's executive vice president, stated, among other things, that plaintiff "was ousted from the Bank's board in late February after board members voted to remove any director who fell behind on loan payments to RNB. At the time, [plaintiff] had delinquent loans at the Bank totalling $714,405.00 according to Bank documents."[5] According to Swartz, as quoted in the article, "only [plaintiff's] loan delinquencies triggered [plaintiff's] ouster" and "the Board decided to change [RNB's] bylaws in February to prevent a Director who fell behind in loans from staying on the Board. Although the change resulted from [plaintiff's] loans, it was not aimed at [plaintiff] alone . . . ."

At about this same time, and after his removal from the RNB board of directors, plaintiff entered into an agreement to sell his shares in RNB to Bank of Hemet (also referred to as Hemet BanCorp), allegedly for the purpose of obtaining funds necessary "to cure existing defaults and pay off certain loans" from RNB. In April 1987 defendant Billings[6] wrote a letter to RNB shareholders describing plaintiff's agreement with Bank of Hemet as "illegal" and "not in the best interests of" RNB.

Based on the foregoing events, plaintiff sued defendants for damages plaintiff allegedly suffered as the result of the board's various actions. Defendants demurred to plaintiff's

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[5] The "bank document" was an apparent reference to the proxy statement prepared by RNB under the signature of defendant Billings as president in anticipation of the annual shareholders meeting then scheduled for April 15, 1987.

[6] Defendant Billings not only was a board member but also was president of RNB.

original complaint and after the trial court apparently sustained that demurrer, while granting plaintiff leave to amend, plaintiff filed his "First Amended Complaint for Illegal Ouster of Plaintiff as a Director; Invasion of Privacy; Breach of the Covenant of Good Faith and Fair Dealing; Defamation; and Interference with Contractual Relationships."[7]

In his first cause of action for "Illegal Ouster," plaintiff alleged the bylaw adopted by defendants on February 26, 1987, violated California Corporations Code section 303 which, according to the allegations of the complaint, prohibits removal of a corporate director prior to expiration of the director's term except under certain specified circumstances, none of which pertained to plaintiff. Consequently, plaintiff alleged the board's action was unlawful and constituted an illegal "ouster" of plaintiff from the board of directors. Additionally, plaintiff alleged the bylaw, by its express language, applied only to directors in default for more than 30 days after adoption of the bylaw. In immediately applying the bylaw to plaintiff, before expiration of the 30-day period, plaintiff alleged the board not only improperly adopted "an ex post facto provision," but also did not fairly apply the bylaw to other directors "similarly situated."

Relying on the foregoing allegations, plaintiff alleged he was denied access to board meetings and "other rights and privileges as a director of the corporation." In addition, plaintiff alleged, as a shareholder of the corporation, "that plaintiff has been denied representation on the Bank's board." Consequently, plaintiff alleged, "As a direct and proximate cause of the illegal action of defendants, and each of them, plaintiff has been illegally ousted as a director of the corpora-

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[7] All further references to the complaint are to plaintiff's First Amended Complaint, as identified, above.

tion and denied his rights as a shareholder. Plaintiff has sustained damages in an amount to be proven at trial."

In his second cause of action for defamation, plaintiff sought compensatory damages of $1.5 million and $3 million in punitive damages based upon defendants' publication of the information contained in the newspaper articles, as set forth above, as well as in the proxy statement and Billings' April 1987 letter to RNB's shareholders. In addition to seeking special damages based upon alleged injury to plaintiff's business as a contractor and real estate developer, plaintiff sought general damages for injury to plaintiff's reputation in the community and plaintiff's "credit and reputation with institutional lenders." Plaintiff further alleged, "As a direct and proximate result of defendants' actions, plaintiff has been forced to sell his stock in Riverside National Bank at book value, which is an amount far less than the actual fair market value of the stock."

Plaintiff's third cause of action, entitled "Wrongful Disclosure of Confidential Information," alleged plaintiff, as a depositor and loan customer of RNB, "reposed trust and confidence in the Bank to maintain [plaintiff's] financial privacy and confidentiality of his loan transactions and records." According to plaintiff, "Defendants, and each of them, had a duty to maintain the confidentiality and privacy of plaintiff's loan accounts with the Bank." Plaintiff further alleged, "As of February, 1987, plaintiff, or his companies, had been in default under the terms and provisions of the various loans with the Bank. In February, 1987 defendants conspired amongst each other and agreed upon a plan to utilize plaintiff's loan defaults as a pretense for ousting plaintiff from the board of directors and thereafter publicizing plaintiff's ouster and his loan defaults in order to damage plaintiff's credit standing and thereby force plaintiff to sell his shareholders [sic] in the Bank."

Plaintiff also alleged, defendants, in furtherance of the conspiracy, adopted the bylaw ousting plaintiff from the board of directors and published information, both in the newspaper, as set forth above, and in the proxy statement sent to shareholders, disclosing the fact and amount of plaintiff's loan defaults. "The publication and disclosure of plaintiff's loan information violated defendants' duty to maintain the privacy and confidentiality of the statements." Plaintiff contended, "As a direct and proximate result of defendants' actions, plaintiff has been required to sell off his shares in the Bank at less than fair market value and has incurred damages in the total amount of $1.5 million." Additionally, plaintiff sought punitive damages in the amount of $3 million.

In his fourth cause of action for tortious breach of the implied covenant of good faith and fair dealing, plaintiff alleged that his status as a loan customer of RNB created a duty on the part of defendants "to deal fairly and in good faith with plaintiff in connection with his loan transactions with the Bank. Defendants had the further duty to deal fairly and in good faith with plaintiff as a shareholder in the Bank to preserve and protect plaintiff's rights as a shareholder." Plaintiff further alleged defendants "breached the implied covenant of good faith and fair dealing by: [¶] (a) Formulating a plan and conspiracy to utilize plaintiff's loan defaults as the pretext for removing plaintiff from the board; [¶] (b) Improperly removing plaintiff as a director of the corporation in violation of Corporations Code § 303(c) and thereby nullifying plaintiff's rights as a shareholder to elect directors; [¶] (c) Failing to give plaintiff an opportunity to cure his loan defaults prior to the adoption of the bylaw; [¶] (d) Utilizing plaintiff's illegal ouster from the board as a pretense for subsequently publishing confidential and private information concerning plaintiff's loan accounts with the Bank and the defaults under these loans; and [¶] (e) Formulating and imple-

menting this plan to force plaintiff into selling his shareholdings in the Bank."

According to plaintiff, "As a direct and proximate cause of defendants' actions, plaintiff was held up to public contempt and ridicule, plaintiff's credit relationship with the Bank was jeopardized, plaintiff's credit relations with other banks and lending institutions was [sic] adversely affected and plaintiff was forced to sell his shareholdings in the Bank in order to pay off or otherwise cure plaintiff's credit obligations to the Bank and other lending instructions [sic]." Relying on the foregoing allegations, plaintiff sought general damages of $1.5 million for the loss he allegedly incurred in selling his stock in RNB at less than fair market value and further sought punitive damages of $3 million.

Plaintiff's fifth cause of action purported to seek compensatory and punitive damages of $1.5 million and $3 million, respectively, on the tort theory of intentional interference with plaintiff's contractual relationships with RNB based upon plaintiff's status both as a shareholder and borrower. In this cause of action, plaintiff alleged defendants knew of plaintiff's contractual relationships with RNB as both a shareholder and borrower and defendants intended, by their actions in adopting the bylaw, removing plaintiff from the board and publishing information regarding plaintiff's loan defaults, to interfere with plaintiff's ongoing business and economic relationships with RNB.

In his sixth cause of action, entitled "Interference with Contractual Relations and Prospective Advantage," plaintiff alleged defendants knew plaintiff had established banking and lending relationships with financial institutions other than RNB and intended, by "expelling" plaintiff from the board of directors and publishing information regarding plaintiff's loan defaults, to interfere with plaintiff's other financial relationships. In this cause of action, plaintiff alleged entitlement to

compensatory damages of $1.5 million allegedly incurred by plaintiff, as the direct and proximate result of defendants' actions, in paying off loans and curing loan defaults with these other financial institutions. Plaintiff also alleged entitlement to $3 million in punitive damages.

As his seventh and final cause of action, plaintiff alleged the actions of defendants, as set forth in the sixth cause of action, alternatively constituted negligent interference with plaintiff's contractual relationships with other financial institutions. Consequently, plaintiff alleged, "As a direct and proximate result of defendants' actions, plaintiff's banking relationships with the other lenders was [sic] disrupted, plaintiff was refused further extensions of credit, and plaintiff has been required to pay off loans with certain lenders and cure defaults on other loans with various lenders. As a direct and proximate result of defendants' actions, plaintiff has sustained damages in the amount of $1,500,000.00."

After the trial court overruled defendants' demurrer to plaintiff's amended pleading, defendants responded to the first amended complaint by filing an answer in the form of a general denial pursuant to Code of Civil Procedure section 431.30, subdivision (d). In their answer, defendants asserted 12 affirmative defenses which not only included the standard allegations (i.e., failure to state a cause of action, insufficient facts to support an award of punitive damages, estoppel, unclean hands, and failure to mitigate damages) but also included specific affirmative allegations, the details of which shall be discussed, as pertinent, below.

Ultimately, and after extensive pretrial proceedings none of which are pertinent to the issues raised in this appeal, the parties proceeded to a jury trial on each "cause of action" of plaintiff's first amended complaint. We shall not recount in detail the evidence presented by plaintiff and defendants during the lengthy jury trial. Summarized briefly, plaintiff

offered evidence to show that during 1986 he obtained a series of short-term, interest only loans from RNB. Each loan was fully secured and approved by defendant Billings. During 1986, the year immediately preceding the board's adoption of the bylaw pertaining to loan defaults by board members, plaintiff occasionally fell behind on monthly or quarterly interest payments on the four loans then outstanding. According to established procedure, defendant Billings routinely extended the due date for payment of the principal balance on plaintiff's loans on condition only that plaintiff was current on interest payments at the time the extension was requested. Plaintiff offered his canceled checks to show plaintiff paid all interest payments due during 1986, although some of those payments arguably were late. Plaintiff also offered evidence, specifically RNB's own records, to show that RNB, purportedly due to an error, did not credit plaintiff with a $4,000 loan payment plaintiff made in March 1986. Once RNB credited that $4,000 payment, plaintiff was not in default and, in fact, was current on all interest payments up through January 18, 1987. Therefore, according to plaintiff's evidence, as of February 18, 1987, when the board initially adopted the bylaw which removed plaintiff from the board of directors, plaintiff was 30 days in default on only one loan and that default occurred because defendant Billings refused to extend or renew that loan.

Plaintiff also offered evidence to show that defendants Swartz, Whitehead, Archambault and Billings met on February 4, 1987, apparently at Billings' request, in what plaintiff described as a "secret meeting" to discuss plaintiff's purported loan defaults and removal from the RNB board of directors. At that meeting, defendant Billings presented a written summary, which Billings apparently specially prepared, of

plaintiff's purported loan defaults.[8] At the February 18, 1987, board meeting, the board adopted the bylaw without discussion. Thereafter, and as above noted, the board held a special meeting on February 26, 1987, for purposes of amending the bylaw to eliminate a purported ambiguity which arguably created a 30-day period in which a director could cure a loan default. Plaintiff also presented evidence to show that at the time the board adopted the bylaw in February 1987 and later in March 1987 defendant Whitehead was in default by more than 30 days on loans from RNB and Bank of America, respectively, but RNB did not invoke the bylaw to remove Whitehead from the board of directors.

In their defense, defendants offered evidence to support their position that the board adopted the bylaw only after consultation with legal counsel and out of concern for the fiscal well-being of RNB in view of plaintiff's purported repeated and serious loan defaults. In other words, defendants' evidence was directed at showing the board's action in adopting the bylaw was lawful and not directed solely at plaintiff. Defendant Billings testified, in part, that the bylaw was not invoked against defendant Whitehead, at least with respect to Whitehead's RNB loan, because Whitehead had the ability to repay his obligations. Therefore, Billings, as president of RNB, determined although the loan was more than 30 days overdue, Whitehead was not in default. Additional evidence presented at trial will be discussed, as pertinent, below.

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[8] Billings' summary of plaintiff's purported loan defaults was not produced during either pretrial discovery or trial, although plaintiff apparently requested production of that document. Plaintiff suggests the summary was destroyed, but the portions of the record cited by plaintiff do not support that suggestion.

At the completion of the 30-day trial, the jury returned a "general verdict with special interrogatories" in which the jury awarded plaintiff a total general damage verdict of $2,254,787. As disclosed by their responses to the special interrogatories, the jury found liability in favor of plaintiff and against defendants on each purported theory of recovery plaintiff pursued at trial and further found the total amount of damages plaintiff suffered in connection with each theory of recovery. The jury's responses to the special interrogatories further disclose the jury found, again in connection with each theory of recovery, that defendants acted with "malice or oppression necessary for an award of punitive damages." Additional details of the general verdict with special interrogatories will be discussed, as pertinent, below. After determining liability, and in a separate proceeding, the jury also awarded plaintiff punitive damages of $2,300,000 against RNB and $130,000 against defendant Billings.

Not surprisingly, defendants moved both for judgment notwithstanding the verdict and for new trial while plaintiff, in turn, sought to recover his costs and also, pursuant to Code of Civil Procedure section 1021.1, plaintiff's attorneys' fees. The trial court denied both of defendants' post-trial motions and awarded plaintiff costs and $254,673 in attorneys' fees.

DISCUSSION

Defendants raise 17 separate purported claims of error in this appeal which effectively challenge every aspect of plaintiff's judgment. More particularly, defendants' first seven issues challenge the various purported causes of action pursued by plaintiff at trial on the grounds such causes of action either are not viable theories of recovery, as matters of law, or that the evidence presented at trial was insufficient to prove such causes of action. Next, defendants raise various claims of purported error committed by the trial court in connection with jury instructions and rulings on the admissibility of various

items of evidence. Defendants' third group of issues are directed at challenging the jury's compensatory and punitive damage awards on the grounds of excessiveness, insufficiency of the evidence and unlawfulness. Defendants further contend the trial court erred in granting plaintiff's Code of Civil Procedure section 1021.1 motion for attorneys' fees. Finally, defendants assert the trial judge was biased in favor of plaintiff and against defendants such that the "demeanor and conduct" of the trial judge, combined with the "erroneous and prejudicial evidentiary rulings," deprived defendants of their right to a fair trial.

We shall not separately address each of defendants' various and numerous contentions in this appeal. As noted previously, the jury returned a general verdict with special interrogatories regarding both liability and damages. The special interrogatories regarding liability disclose the jury found defendants' liable to plaintiff under each theory of recovery plaintiff pursued at trial. The special interrogatories regarding damage, in turn, reveal the various damage amounts the jury attributed to each theory of recovery. In Tavaglione v. Billings, supra, the Supreme Court instructed, as above noted, that in order to affirm the entire judgment of $2,254,787, we must "review the jury's responses to the special interrogatories [presumably with respect both to liability and damages] . . . to determine whether: (1) they were free from prejudicial error, (2) they were supported by substantial evidence, and (3) they were based on separate items of compensable damage so as to justify aggregating them in computing the total amount of the judgment." (Tavaglione v. Billings, supra, 4 Cal.4th at p. 1159.) The Supreme Court further instructed that in order for this court "to sustain the judgment against defendants in the stated amount," we must "review and uphold a sufficient number of separate damage findings which, when combined, equal[] or exceed[] the amount of the judgment." (Ibid.)

In accordance with the foregoing instructions, in order to obtain a reversal of the entire judgment, defendants must demonstrate reversible error in connection with each theory of recovery pursued by plaintiff at trial and upon which the jury found defendants liable. Absent such a showing by defendants, we must affirm the judgment with respect to those theories of recovery which are free from defendants' claims either of legal error or factual insufficiency, albeit in an amount supported by the jury's responses to the special interrogatories regarding damages in connection with those valid theories of recovery. We have reviewed defendants' numerous claims of error with respect to each of plaintiff's various theories of recovery. While we share defendants' view that plaintiff's first purported cause of action for damages based on defendants' "illegal ouster" or removal of plaintiff from the RNB board of directors does not, as a matter of law, state a theory of recovery which supports an award of damages, we shall not address that issue, or any of defendants' other challenges to that cause of action. Even if we were to conclude plaintiff's recovery under the first cause of action was, for some reason, invalid, that conclusion would not require reversal of the entire judgment in view of the jury's liability and damage findings in connection with plaintiff's other theories of recovery.

In addition to finding defendants illegally removed plaintiff from the RNB board of directors and finding plaintiff suffered $2,254,787 in damage as a result of that action, the jury also found defendants liable under plaintiff's defamation cause of action and further found plaintiff suffered $604,787 in damage as a result of defendants' defamatory statements. The jury also found defendants liable for breach of the implied covenant of good faith and fair dealing and further found plaintiff suffered $1,650,800 in damage as a result of defendants' breach of that implied contract term.

We conclude, as we shall explain, that the jury's findings with respect both to liability and damage in connection with plaintiff's causes of action for defamation and breach of the implied covenant of good faith and fair dealing are free from defendant's claims of prejudicial error and are supported by substantial evidence. We further conclude, again as we shall explain, the damages the jury attributed to those two theories of recovery relate to separate items of compensable injury so as to justify aggregating those two damage amounts. The aggregate of those two damage awards, in turn, exceeds the jury's total damage general verdict and, according to the Supreme Court, therefore, supports the judgment in the stated amount of $2,254,787.

Consequently, we shall only address defendants' claims of error to the extent those claims relate, directly or indirectly to plaintiff's recovery under the defamation and breach of the implied covenant of good faith and fair dealing causes of action. Accordingly, the issues we must address and resolve in this appeal are as follows:

(1) Were the facts contained in the various alleged defamatory statements attributed to defendants matters of public concern such that plaintiff not only had the burden to prove falsity of those facts but also defendants' fault in publishing them, and, if so, did plaintiff meet that burden?

(2) Was plaintiff a public figure such that the trial court erred in failing to instruct the jury that in order to return a verdict in favor of plaintiff on the defamation theory of recovery the jury must find defendants published the statements in question with knowledge of their falsity or reckless disregard for the truth?

(3) Was there sufficient evidence presented at trial to prove defendants' defamatory statements proximately caused the $604,797 in damage the jury attributed to plaintiff's cause of action for defamation?

(4) Was there sufficient evidence presented at trial to prove either a contractual or fiduciary relationship between plaintiff and defendants in connection with plaintiff's loans from RNB such that defendants owed plaintiff a duty of good faith and fair dealing in connection with those loans and, if so, was there sufficient evidence presented to prove defendants breached that implied duty?

(5) Did the trial court err in giving certain jury instructions challenged by defendants in connection with plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing, and, if so, were these instructions prejudicial?

(6) Was there sufficient evidence presented at trial to prove defendants' breach of the implied covenant of good faith and fair dealing proximately caused plaintiff $1,650,800 in damage the jury attributed to plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing?

(7) Did the trial court adequately instruct the jury on plaintiff's duty to mitigate his damages?

(8) Was the jury's compensatory damage award excessive as a matter of law?

(9) Was the punitive damage award improper, first, because defendant RNB, as an instrumentality of the federal government, was immune from liability for such damages, second, because evidence supported defendants' assertion that they relied on advice of counsel and therefore did not act with malice and finally, because the award was excessive and therefore constituted a "taking of property without due process of law"?

(10) Were defendants denied a fair trial as the result of the trial court's purported erroneous and prejudicial evidentiary rulings against defendants and purported bias in favor of plaintiff?

(11) Did defendants act reasonably in rejecting plaintiff's pretrial offer for judgment under Code of Civil Procedure section 998 such that the trial court abused its discretion in awarding plaintiff attorneys' fees under Code of Civil Procedure section 1021.1?

We are able further to reduce the issues we must address in this appeal by noting defendants' near-total failure to demonstrate that the issues asserted in this appeal were, where necessary, first raised by defendants in the trial court and therefore preserved for review on appeal. In other words, because the "party challenging a judgment has the burden of showing reversible error by an adequate record" (Ballard v. Uribe (1986) 41 Cal.3d 564, 574) defendants' claims of error must include appropriate citations to the record showing where the purported error occurred, and if appropriate, that defendants objected to that error in the proceeding below. "An appellate court is not required to search the record to determine whether or not [it] supports appellants' claim of error. It is the duty of counsel to refer the reviewing court to the portions of the record which support appellants' position." (Green v. City of Los Angeles (1974) 40 Cal.App.3d 819, 835; see Cal Rules of Court, rule 15(a).)[9] Defendants, by failing in

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[9] We included the above criticism in our original opinion in this appeal. Defendants responded to that criticism by noting they included references to the record on appeal in the introductory portions of their opening brief and in doing so complied with rule 15(a). California Rules of Court, rule 15(a) requires that, "The statement of any matter in the record shall be supported by appropriate reference to the record." In our view, rule 15(a) requires a reference to the record each time a party's brief includes a statement of matter that occurred in the trial court and therefore appears in the record. We might excuse a party's failure to comply strictly with rule 15(a) in a case where either the record on appeal or the party's brief is relatively short, such that finding record citations in the brief or matters directly in the record is not particularly

(continued...)

their opening and reply briefs to provide anything other than cursory citations to the joint appendix in lieu of clerk's transcript or to the reporter's transcript, have failed, almost without exception, to demonstrate error occurred in the trial court. In failing adequately to cite the record, defendants either misperceive the function of appellate review[10] or would have us assume the purported error was raised somewhere in the trial court and can be found by reviewing the voluminous joint appendix and reporter's transcript. Whatever the possible

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[9](...continued)
difficult. This, however, is not such a case. The record on appeal is enormous and it is nearly impossible to find matters in that record without an appropriate citation. Likewise, defendants' opening brief consists of 119 pages such that it is extremely burdensome for this court to locate references to the record which defendants may have included in some portion of the brief but which defendants did not repeat in their discussion of the issue to which the matter in the record actually relates. More importantly, in accordance with our construction of rule 15(a), and as noted previously, we returned defendants' opening brief with directions to defendants to annotate the discussion portions of that brief with appropriate citations to the record. Defendants only partially complied with our directions, including some references to the record on appeal and omitting other references necessary to support their various claims of error. To the extent those omitted record citations pertain to matters in the record essential to support defendants' various claims of error, we will not address those claims.

[10] In this regard, we note defendants apparently do misunderstand the function of an appellate court, at least with respect to reviewing the sufficiency of the evidence, as reflected in their response to plaintiff's assertion that defendants, in this connection, set out only evidence favorable to the defense. Defendants retort, in pertinent part, that "the settled rule . . . in measuring the sufficiency of the evidence," is that "this court must review the entire record on appeal." Defendants' assertion is incorrect, as we discuss in detail, below, to the extent it suggests we must read the entire record to determine what evidence was presented.

explanation, defendants generally have not met their burden of demonstrating error occurred in the lower court proceeding.

Defendants' oversight would be troublesome in a case which involved only a relatively small trial court record. The record here, however, is formidable, to say the least, and consists of over 4,000 pages of joint appendix and 3,349 pages of reporter's transcript. Assuming defendants were aware of their burden on appeal to support their claims of error with appropriate citations to the appellate record, we are compelled to interpret defendants' failure to include those citations as an implicit invitation to this court to ferret out the error ourselves. We decline defendants' invitation. To the extent we are unable to ascertain from defendants' briefs whether error occurred and where appropriate, whether defendants preserved a claim of error by appropriate objection in the trial court, we either shall not address that issue, because the error has not been preserved for review on appeal, or we shall address the issue according to our interpretation of the manner in which the error may have occurred in the trial court.

With the foregoing in mind, we begin our discussion of the 11 issues we must address in this appeal with defendants' challenges to plaintiff's defamation cause of action and the jury's related finding of liability in connection with that theory of recovery. As set out above, defendants first assert the facts contained in the various alleged defamatory statements attributed to defendants were matters of public concern. Based on that assertion, defendants contend plaintiff, in order to establish defendants' liability for defamation, had to prove falsity of the facts contained in those statements as well as defendants' fault in publishing those facts.[11] Resolution

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[11] Defendants' characterization of this issue, as set out in the caption which precedes defendants' discussion, is that "plaintiff has

(continued...)

of this issue requires us to address facts and legal principles which also are pertinent to defendants' contention, denominated above as issue number two, that plaintiff was a public figure, therefore, in order to establish defendants' liability for defamation or, alternatively, to recover punitive damages based on defendants' defamatory statements, plaintiff was required to prove defendants made the allegedly defamatory statements either knowing the statements were false or with reckless disregard for the truth. Because these two contentions are related, we shall address them both in this portion of our discussion.

1.

DEFENDANTS' CHALLENGES TO PLAIN-TIFF'S RECOVERY FOR DEFA-MATION

A. Defendants' Challenges to the Jury's Liability Finding

Defendants raise two specific challenges to the jury's liability finding in connection with plaintiff's defamation cause of action. First, and as noted above, defendants contend the facts contained in the various alleged defamatory publications attributed to defendants were matters of public concern such that plaintiff had the burden at trial to prove the falsity of those facts as well as defendants' fault, which burden plaintiff failed to meet. Next, defendants claim plaintiff was a public

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[11](...continued)
neither pleaded nor proved any cause of action for defamation since truth is an absolute defense and there can be no liability for unfavorable interpretation of the facts by others. Despite the caption, defendants do not discuss, least of all cite, any purported pleading defects. Instead, defendants' discussion focuses entirely on the evidence presented at trial and, as such, apparently is directed at challenging the sufficiency of that evidence. We, therefore, will focus our discussion, accordingly.

figure such that the trial court erred in failing to instruct the jury that in order to return a verdict in favor of plaintiff on the defamation theory of recovery the jury must find defendant published the statements in question with knowledge of their falsity or reckless disregard for the truth.

In raising their initial contention that defendants' allegedly defamatory statements pertained to matters of public concern and, therefore, plaintiff had the burden to prove both falsity and fault, defendants fail to demonstrate whether, and if so how, they raised this issue in the trial court. In their discussion of this contention, defendants' only reference to the trial transcript occurs in the context of reciting evidence offered by plaintiff to prove falsity of the purportedly defamatory statements in question. Consequently, we initially assumed the trial court instructed the jury regarding plaintiff's purported burden of proof such that defendants' contention in this regard amounted to an attack on the sufficiency of the evidence to prove falsity of the statements in question. Upon reviewing the record, however, we ascertained that the trial court did not give the jury such instruction, but instead instructed the jury, apparently at defendants' request, that, "A publication in a newspaper regarding a private citizen may be privileged if it is a matter of public interest to the residents of that community, and only published within that community. A publication is of public interest if its appeal is not merely a matter of gossip or idle curiosity but deals with substantial matters affecting the general public such as the prevention of crime and the apprehension of criminals, the obtaining of relief from socially recognized evils, or the criticism of work performed by contractors paid from public funds. The privilege cannot be defeated if there was a 'bona fide purpose to give the public the benefit of comment which it is entitled to

have, rather than for any ulterior motive of causing harm to the plaintiff.' "[12]

Because the jury was not instructed that plaintiff had the burden to prove both falsity and fault, and further, because defendants do not suggest, either explicitly or by implication, that they requested such an instruction which the trial court refused to give or that defendants otherwise raised this issue in the trial court, we need not and, therefore, shall not address defendants' initial claim of error regarding the defamation cause of action. Stated bluntly, defendants have not demonstrated this issue was raised in the trial court and thereby preserved for review on appeal.

Defendants' second challenge to the defamation cause of action, as noted above, is the trial court gave erroneous and incomplete instructions to the jury. Defendants' discussion of this issue focuses exclusively on the trial court's refusal to instruct the jury on constitutional "actual malice" according to BAJI No. 7.04 which, as requested by defendants, would have instructed the jury, in pertinent part, that, "A published statement about a public figure is absolutely privileged, even if false and untrue, unless the publication was made by the defendant with knowledge that it was false or with a reckless disregard for the truth."

Defendants raise two contentions with respect to the trial court's refusal to give the above instruction. First, defendants contend the evidence presented at trial established

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[12] Although the foregoing jury instruction includes quoted material, the instruction included in the record on appeal does not identify the authority for the quotation. Moreover, while the instruction does not identify defendants as the requesting parties, defendants acknowledged in both their motion for judgment notwithstanding the verdict and motion for new trial, that the trial court gave the instruction at defendants' request.

plaintiff was a public figure or, at the very least, a limited purpose public figure, as defined in Gertz v. Robert Welch, Inc. (1984) 418 U.S. 323. Therefore, defendants argue plaintiff was required to prove actual malice in order to establish defendants' liability for the alleged defamation and the trial court erred by refusing to instruct the jury in that regard. Alternatively, defendants contend that "[t]he settled law in this country is that no defamation plaintiff is entitled to punitive damages unless he can show that the defendant published the offensive statements with knowing falsity or with reckless disregard for the truth." Therefore, defendants contend the trial court erred in permitting the jury to award punitive damages in connection with the defamation cause of action without proof of actual malice.

In discussing these contentions, defendants first correctly point out, and with appropriate citations to the record, that the trial court refused to give BAJI No. 7.04 as requested by defendants. Instead, the trial court instructed the jury, as pertinent to this issue, "If you conclude that defendant [sic] published a libel of plaintiff with actual malice, then in your discretion you may determine whether or not to award plaintiff punitive damages."[13] The trial court further instructed

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[13] The record discloses the foregoing instruction apparently is a modification of BAJI No. 7.12. The use note accompanying BAJI No. 7.12 indicates the instruction "should be used only in cases which are filed under Civil Code, § 48a [pertaining to defamation actions against media defendants], and if punitive damages are sought in other libel/slander cases the court should use BAJI 14.17 [general instruction on recovery and measure of punitive damages]." (See BAJI No. 7.12 (7th ed. 1986) pp. 279, and related 1993 pocket part, pp. 133-134.) Because defendants are not members of the media, the trial court erred in giving this instruction. The correct instruction, as we shall explain, is BAJI No. 14.71, the general punitive damage instruction which requires and defines "malice," rather than "actual malice."

the jury according to BAJI No. 14.71[14] on "malice" necessary to support an award of punitive damages.

Defendants, as above noted, contend the trial court erred in refusing to give BAJI No. 7.04 regarding constitutional malice because plaintiff was a public figure. The general principles which govern resolution of this issue are well known and discussed thoroughly in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749. Simply stated, where the purportedly defamatory statement pertains to a public issue and the plaintiff is a public official or public figure, First Amendment free speech interests require the plaintiff prove not only that the statements are false but also that the statements were made with actual malice, i.e., knowledge of their falsity or reckless disregard for whether the statement was or was not false. (Id. at p. 755, citing New York Times Co. v. Sullivan (1964) 376 U.S. 254, and Curtis Publishing Co. v. Butts (1967) 388 U.S. 130.) Where the allegedly defamatory statement pertains to a matter of public

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[14] As given by the trial court, BAJI No. 14.71 instructed the jury, in pertinent part, that, "If you find that plaintiff suffered damage as a legal result of the conduct of defendant on which you base a finding of liability, you may then consider whether you should award punitive damages against defendants for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by clear and convincing evidence that said defendant was guilty of oppression or malice in the conduct on which you base your finding of liability. [¶] `Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried [on] by the defendant with a willful and conscious disregard for the rights or safety of others. A person acts with conscious disregard of the rights or safety of others when he or she is aware of the probable dangerous consequences of his or her conduct and willfully and deliberately fails to avoid those consequences. . . . [¶] `Despicable conduct' is conduct which is so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people."

concern, but the plaintiff is neither a public official nor public figure, First Amendment interests, although less significant, nevertheless preclude states from allowing plaintiffs to recover "presumed or punitive damages absent a showing of 'actual malice.' " (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, 472 U.S. at p. 756, citing Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323.) Where the allegedly defamatory statements do not involve matters of public concern and the plaintiff is neither a public official nor public figure, First Amendment concerns are minimal and the "state interest in providing remedies for defamation . . . adequately supports awards of presumed and punitive damages -- even absent a showing of 'actual malice.' [Fn. omitted.]" (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, 472 U.S. at p. 761.) Finally, the question of whether the foregoing constitutional protections apply in any given case is one of law. (Connick v. Myers (1983) 461 U.S. 138, 148, fn. 7.)[15]

With the foregoing general principles in mind, we turn to those principles specifically pertinent to determining, as a question of law, whether plaintiff, as defendants contend, was a public figure and as such was required to prove actual malice. Here again, the specific principles which guide our analysis are discussed thoroughly by the California Supreme Court in Reader's Digest Assn. v. Superior Court (1984) 37 Cal.3d 244, where the Court noted that in Gertz v. Robert Welch, Inc., the United States Supreme Court "defined two classes of public figures. The first is the 'all purpose' public figure who has 'achiev[ed] such pervasive fame or notoriety

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[15] Defendants, in discussing this issue, also complain that the trial court refused their requested jury instruction which identified the circumstances under which a person may become a public figure. Because the determination of plaintiff's status as a public figure is a question of law, rather than fact, we conclude the trial court correctly refused defendants' instruction on that issue.

that he becomes a public figure for all purposes and in all contexts.' The second category is that of the 'limited purpose' or 'vortex' public figure, an individual who 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.' [Citation.] Unlike the 'all purpose' public figure, the `limited purpose' public figure loses certain protection for his reputation only to the extent that the allegedly defamatory communication relates to his role in a public controversy." (Reader's Digest Assn. v. Superior Court, supra, 37 Cal.3d at pp. 253-254, citing Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 351.)

According to the foregoing principles, and contrary to defendants' contention, we conclude, as a matter of law, that plaintiff was neither an all purpose nor limited purpose public figure. Defendants apparently contend plaintiff was an all purpose public figure as evidenced by the trial testimony of plaintiff's own witnesses that in Riverside plaintiff's name was a "household word" and even before plaintiff "ceased to be a member" of RNB's board of directors, plaintiff's "affairs" received press coverage.[16] In our view, the evidence relied on by defendants does not meet the standard enunciated by the Supreme Court in Gertz which requires "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society" before "an . . . individual [is] . . . deemed a public personality for all aspects of his life." (Gertz v. Robert Welch, Inc., supra, 418 U.S. at p. 352.)

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[16] Defendants also point to testimony from various plaintiff's witnesses, some of whom apparently worked for plaintiff as subcontractors, that the publicity regarding plaintiff's ouster from the board of directors was so pervasive (1) their children were taunted at school as a result of the press reports and (2) the news articles negatively affected the opinion of plaintiff held by several witnesses. This evidence, in our view, undermines rather than supports defendants' general position.

Absent such evidence, "It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." (Ibid.)

Our analysis and discussion of whether plaintiff was a limited purpose public figure, i.e., in the context of the specific controversy in which the defamation occurred, is guided by the observations of the California Supreme Court in Reader's Digest Assn. v. Superior Court, supra, "that a person . . . should not be considered a `public figure' solely because that person . . . is a criminal defendant [citation]; has sought certain relief through the courts [citation]; or merely happens to be involved in a controversy that is newsworthy [citation]. Rather, as this court recognized in Vegod Corp. v. American Broadcasting Companies Inc. (1979) 25 Cal.3d 763 . . . , a 'public figure' plaintiff must have undertaken some voluntary act through which he seeks to influence the resolution of the public issues involved. [Fn. omitted.] As such, the mere involvement of a person in a matter which the media deems to be of interest to the public does not, in and of itself, require that such a person become a public figure for the purpose of a subsequent libel action. [Original emphasis.]" (Reader's Digest Assn. v. Superior Court, supra, 37 Cal.3d at p. 254.)

The evidence relied on by defendants to support their contention plaintiff was a limited purpose public figure does not establish that the controversy in question involved public issues, least of all that plaintiff voluntarily injected himself into the fray for the purpose of influencing such issues. More particularly, defendants first point to evidence that plaintiff's "ouster" from the board of RNB was a matter of "considerable interest in Riverside County" and the "incident was so newsworthy that children of plaintiff's subcontractors were allegedly taunted at school based on the press reports." Next,

defendants contend plaintiff "voluntarily injected himself into the controversy" as evidenced by the fact and content of plaintiff's interviews by the press. In our view, that evidence establishes only that the local newspaper considered plaintiff's "ouster" from the board to be newsworthy and to that end contacted plaintiff and defendants for information and comments. In short, defendants' evidence demonstrates only that as a result of press interest and coverage, plaintiff's removal from the board of directors based upon plaintiff's purported loan delinquencies became a public controversy. Such evidence, as noted above in Readers Digest Assn. v. Superior Court, is insufficient to establish plaintiff became a public figure for purposes of that controversy.

According to Reader's Digest, a plaintiff does not become a limited purpose public figure, and therefore required to prove actual malice, merely by being involved in a controversy which receives press coverage. The controversy must be one which involves "public issues." In other words, the controversy must involve a matter of legitimate public concern. In Dun & Bradstreet Inc. v. Greenmoss Builders, Inc., the United States Supreme Court "held that '[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record.' [Citation.]" (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, 472 U.S. at p. 761.)

Looking at the content, form and context of defendants' statements, as reported in the newspaper, we conclude plaintiff's removal from the board of directors of RNB and the details of plaintiff's purported loan defaults were not matters

of public concern.[17] The public, or more particularly the local community in which the controversy occurred, had no power to influence the outcome of the purported controversy. The decision to remove plaintiff from the board of directors and the power to effect that decision here rested exclusively with the board members.[18] No discussion or debate among members of the public was necessary and, in fact, the bylaw amending the qualifications for board members specifically precluded specified members of the public, i.e., shareholders, from in any way circumventing defendants' action of removing plaintiff from the board. Moreover, the content of defendants' statements, which included not only the fact of plaintiff's removal from the board but also the specific details of plaintiff's purported loan defaults, went well beyond any legitimate interest the public might have had in the controversy.

Arguably, defendants had an interest in publicly commenting on plaintiff's removal and purported loan defaults in view of RNB's apparent dependence on the local community for its depositors and customers. In other words, RNB legitimately might be concerned that the controversy, and attendant publicity, surrounding plaintiff's removal from the board due to alleged significant loan defaults could undermine

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[17] Arguably, plaintiff's removal from the board of directors based on his purported loan defaults was a matter of legitimate concern to RNB shareholders. Because defendants do not discuss this concern and further because plaintiff introduced evidence regarding four separate allegedly defamatory statements, proof of any one of which would support recovery, we shall not address the statements contained in the proxy statement.

[18] Throughout their brief, defendants use various euphemisms to describe plaintiff's departure from the board of directors. We describe that event as plaintiff's removal from the board pursuant to the board's adoption of the now well-described bylaw.

trust and confidence in RNB among its customers and potential customers, most of whom presumably resided in the local community. Defendants' concerns in this regard, however, do not elevate an otherwise private dispute to a controversy involving public issues. In short, we conclude here, as with the credit report at issue in Dun & Bradstreet, that defendants' statements to the press involved "speech solely in the individual interest of the speaker and its specific business audience. . . . This particular interest warrants no special protection when -- as in this case -- the speech is wholly false and clearly damaging to the victim's business reputation. . . ." (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, 472 U.S. at p. 762.) Accordingly, we conclude, as a matter of law, plaintiff was not a public figure, either for all purposes or for purposes of this controversy. Therefore, we likewise must conclude the trial court did not err in refusing to give BAJI No. 7.04, or any other jury instruction requested by defendants, regarding constitutional, or actual, malice.

We also reject defendants' contention, above noted, that punitive damages may never be recovered in a defamation action absent proof of actual malice, therefore the trial court erred in refusing to instruct the jury in this regard. Defendants' assertion simply is an incorrect statement of law. As previously discussed, above, the Supreme Court held in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, that proof of actual malice is not required in a defamation action by a private person against a non-media defendant where the defamatory statements do not pertain to matters of public concern. Under such circumstances, presumed and punitive damages may be recovered without proof of actual malice. (Dun & Bradstreet, Inc. v. Greenmoss Builders Inc., supra, 472 U.S. at 763.)

We have concluded, as discussed previously, that plaintiff in the context of the defamation action, was not a

public figure for all purposes. We have further concluded because the defamatory statements did not relate to matters of public concern, plaintiff was not a limited purpose public figure. Although actual malice must be proved under Civil Code section 48a (see fn. 4 supra), defendants clearly are not members of the media. Consequently, in order to recover punitive damages, plaintiff must prove malice as defined in Civil Code section 3294. The trial court, as noted above, instructed the jury on both the requirement and definition of malice as used in Civil Code section 3294 by giving BAJI No. 14.71. Accordingly, we conclude, to the extent challenged by defendants, the trial court's jury instructions in connection with the defamation cause of action properly were given.

Defendants' final challenge to the defamation cause of action, albeit raised by defendants in the connection with their assertion that the compensatory damage award was excessive as a matter of law, is that "plaintiff did not meet his burden of establishing the falsity of any statement attributed to defendants." As we have previously discussed, in detail, because the publications in question did not involve matters of public concern and because plaintiff was not a public figure, plaintiff was not required to prove falsity of the statements. Stated otherwise, "The burden of proof with respect to the issue of truth or falsity is on the defendant." (Brown v. Kelly Broadcasting Co., (1989) 48 Cal.3d 711, 753, fn. 37, quoting Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal.2d 224, 233.) The trial court properly instructed the jury in this regard.

Because defendants steadfastly have adhered to the assertion that plaintiff had the burden to prove falsity, they do not address the question of whether their evidence proved the truth of each of the four defamatory statements in question. In order to dispel any suggestion that defendants may have met

their burden in this regard we briefly shall review the pertinent evidence.

We begin our discussion in this regard with the well-established principle that "a reviewing court must start with the presumption that the record contains evidence to sustain every finding of fact; the appellant must demonstrate that there is no substantial evidence to support the challenged findings; one contending the evidence does not support some particular issue of fact must set forth in his brief all the material evidence bearing upon that issue and not merely the evidence favorable to him; failure to so state the evidence shall be deemed a waiver of the claimed error. [Citations.] [Original emphasis]." (Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co. (1977) 66 Cal.App.3d 101, 152.)

Although defendants do not directly and expressly discuss the evidence pertinent to the defense of truth, they do so by implication in their misguided challenge to the sufficiency of plaintiff's evidence to prove falsity. In so doing, defendants have not complied with the foregoing obligation to recount all evidence pertinent to an issue. Defendants, therefore, have established only that there was a conflict in the evidence presented at trial. "The test of course, is not whether there is a substantial conflict in the evidence but whether there is substantial evidence in favor of the respondent. [Citations.]" (Crogan v. Metz (1956) 47 Cal.2d 398, 404.) For this reason, we conclude defendants have failed to overcome the presumption on appeal that the record contains evidence sufficient to support every factual determination essential to the underlying judgment which includes the finding, implicit in the jury's determination of liability under plaintiff's defamation theory, that defendants did not prove the truth of each of the defamatory statements.

Moreover, we conclude substantial evidence supports the jury's implied finding that some, if not all, of the publica-

tions attributed to defendants were false. Defendants acknowledge that plaintiff's defamation cause of action was based upon four allegedly defamatory publications -- the two March 1987 newspaper articles, the March 1986 [sic] proxy statement and the April 1987 letter from Billings to the shareholders. At trial, plaintiff sought to prove the two newspaper articles and the proxy statement were false because all three publications wrongly stated both the fact and amount of plaintiff's purported loan defaults. To that end, and as above noted, plaintiff presented evidence to show his loan history with RNB consisted of a series of short-term, interest only loans, the majority of which were commercial. RNB, through Billings, the president of RNB, approved all loans to members of the board of directors, and routinely rolled-over, or renewed, plaintiff's loans so long as plaintiff was current on monthly or quarterly interest payments. Plaintiff's loans were all secured with adequate collateral. Plaintiff offered evidence, consisting of his canceled checks to prove that during all of 1986 plaintiff was current on loan interest payments.

Defendants, through the testimony of Richard Larson, the credit administrator of RNB at the time pertinent to the issues raised at trial, attempted to refute plaintiff's evidence that his interest payments were current during 1986, the period arguably in question at trial. According to Larson, during 1986, plaintiff had four loans outstanding from RNB. It was developed through Larson's testimony and RNB's own records that due to a purported accounting error, RNB did not credit plaintiff with a $4,000 interest payment plaintiff made in March 1986. As a result of that error, defendants erroneously concluded plaintiff was in default on various loans when, in fact, he was not. According to defendants' own records, as of December 31, 1986, plaintiff was current in payments on two of the four loans and was delinquent on one month of interest payments on the other two. The combined delinquent interest payments on those two loans totalled approximately $3,500,

less than the amount of the plaintiff's uncredited $4,000 payment.[19] Because Billings, contrary to established procedure, did not renew or extend plaintiff's then outstanding loan, the principal balance was also due and owing.

The foregoing, in our view, constitutes substantial evidence to support the jury's implied finding that plaintiff was not in default on any loans, least of all on $715,000 in loans, as stated in the two newspaper articles and the proxy statement. In other words, defendants did not meet their burden to prove the foregoing statements were true. Accordingly, we conclude substantial evidence supports the jury's implied determination that the statements attributed to defendants in the two newspaper articles and the proxy statement were false. That implied finding is sufficient to establish defendants' liability under the defamation cause of action. Therefore, we need not address defendants' claims regarding Billings' letter to the shareholders.

In summary, for the reasons discussed above, we conclude defendants' various challenges to the jury's liability finding in connection with plaintiff's defamation cause of action either are substantively meritless or procedurally defective. In other words, we conclude that liability finding is free from defendants' purported claims of prejudicial error and, further, is supported by substantial evidence. Accordingly, we next address the jury's defamation damage finding and defendants' purported challenges thereto.

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[19] Defendants further emphasized the falsity of defendants' various statements regarding plaintiff's purported loan defaults as reported in the newspaper and contained in the proxy statement when Larson, apparently from the witness stand and during his testimony, presented plaintiff with a check from RNB for plaintiff's loan overpayment.

B. The Jury's Defamation Damage Finding

The jury attributed $604,787 in compensatory damages to plaintiff's defamation cause of action, as evidenced by the jury's response to question number 2(A) of the special interrogatories. Plaintiff offered evidence at trial to show the revenue from his construction business fell by $3,000,000 during the 12 months following publication of defendants' defamatory statements as a result of which plaintiff suffered economic loss of $604,787, i.e., the profit that lost construction business would have generated. That evidence, in turn, supports the conclusion that the jury's damage award in connection with plaintiff's defamation cause of action represents compensation for injury to plaintiff's business interests resulting from defendants' defamatory statements. As such, the $604,787 damage award represents compensation to plaintiff for a specific item of injury. In accordance with the guidance provided by the Supreme Court, as set out above, we next must determine whether that damage award is free from defendant's various claims of purported prejudicial error or factual insufficiency.

Defendants do not specifically challenge the individual damage awards the jury included in their responses to the damage special interrogatories. Instead, defendants generally challenge the total $2,254,787 compensatory damage award on the grounds the evidence was insufficient to prove defendants' actions were the proximate cause of plaintiff's damage and such award was excessive as a matter of law. In connection with those claims, defendants raise two arguments which pertain to the jury's award of damages in connection the defamation cause of action. First, defendants assert, albeit in the context of attacking the entire $2,254,787 damage general verdict as excessive, that plaintiff did not meet his burden of proving the falsity of any statement attributed to defendants.

We addressed and rejected this precise assertion in our discussion of defendants' various challenges to the jury's liability determination under the defamation cause of action. Therefore, we shall not address that claim again.

In challenging the sufficiency of the evidence to establish proximate cause, defendants assert "plaintiff did not establish that defendants proximately caused the alleged unsubstantiated losses in plaintiff's construction business." Defendants do not support this statement with a discussion of the evidence presented at trial or with citations to the record on appeal. Because defendants do not discuss this claim, we shall not address it, other than to note defendants' unsubstantiated statement does not demonstrate the insufficiency of the evidence on this issue. Defendants further state, again in the context of challenging the entire general damage verdict as excessive, the "damages awarded by the jury for plaintiff's alleged loss of construction business was [sic] also grossly excessive and not supported by the evidence." Moreover, defendants claim "plaintiff did not adduce sufficient evidence to show that any alleged loss or decrease in his construction contracts proximately caused by defendants' conduct." Once again, defendants do not support either of these assertions with a discussion of the pertinent evidence presented at trial. We construe defendants' oversight in this regard as an implicit admission that the evidence recounted above regarding plaintiff's loss of construction business and related loss of profit accurately describes the evidence presented at trial.[20]

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[20] In a separate recitation of the purported evidence presented at trial, defendants acknowledge plaintiff's testimony regarding his loss of construction business in the months following publication of the defamatory newspaper articles. Defendants also recount other evidence, presumably presented by defendants, which arguably contradicts plaintiff's evidence on this question. Defendants' purported recitation of

(continued...)

That evidence, in turn, supports the jury's implied finding that defendant's defamatory statements proximately caused plaintiff's loss of construction business revenue and further supports the jury's damage award for that loss.

For the reasons discussed, we conclude the $607,787 in damages the jury attributed to plaintiff's defamation cause of action not only represents compensation for a separate item of injury but, also, is free from defendants' claims of error and, further, is supported by substantial evidence. Accordingly, we conclude $604,787 of the total general damage verdict is supported by the jury's liability and damage findings in connection with plaintiff's defamation theory of recovery.

We next address defendants' various challenges to plaintiff's recovery based upon defendants' breach of the implied covenant of good faith and fair dealing.

2.

DEFENDANTS' CHALLENGES TO PLAINTIFF'S RECOVERY FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. Defendants' Challenges to the Jury's Liability Finding

In connection with plaintiff's recovery for breach of the implied covenant of good faith and fair dealing, defendants contend, generally, that there is no cause of action for breach of the implied covenant of good faith and fair dealing in

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[20](...continued)
the evidence, at best, demonstrates there was conflicting evidence presented at trial with respect to plaintiff's loss of construction business revenue. Defendants' showing, however, does not demonstrate the insufficiency of the evidence to support either the fact or amount of plaintiff's loss. (Crogan v. Metz, supra, 47 Cal.2d at p. 404.)

connection with RNB's loans to plaintiff, and, in any event, the jury instructions on the subject clearly were erroneous. Despite defendants' general characterization of the issue, defendants raise two specific claims with respect to plaintiff's theory of recovery, both of which are directed at demonstrating defendants did not owe plaintiff a duty of good faith and fair dealing in connection with plaintiff's loans from RNB. First, defendants contend plaintiff failed to plead or prove defendants breached an existing contract with plaintiff which created an obligation on the part of defendants to renew or extend plaintiff's loans. Defendants next contend, as a matter of law, that plaintiff's loan agreements with RNB did not result in a fiduciary relationship between plaintiff and defendants and, therefore, defendants did not have a duty to renew or extend plaintiff's loans. We disagree with defendants' initial claim and, therefore, need not address defendants' second contention.

As defendants correctly point out, the duty of good faith and fair dealing is an implied contract term and, therefore, depends on the existence of a contract between plaintiff and defendants. As the Supreme Court explained in Foley v. Interactive Data Corporation (1988) 47 Cal.3d 654, " 'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.' [Citation.] This duty has been recognized in the majority of American jurisdictions, the Restatement [of Contracts], and the Uniform Commercial Code. [Citation.] Because the covenant is a contract term, however, compensation for its breach has almost always been limited to contract rather than tort remedies. As to the scope of the covenant, '[t]he precise nature and extent of the duty imposed by such an implied promise will depend on the contractual purposes.' [Citation.]" (Id. at pp. 683-684.)

In challenging plaintiff's theory of recovery, defendants acknowledge plaintiff's claim for breach of the implied

covenant of good faith and fair dealing was predicated on plaintiff's loans from RNB. Defendants contend, however, that plaintiff did not allege or prove defendants' breach of an existing contract with plaintiff. Despite defendants' blanket assertion that no evidence was presented at trial to establish the contractual relationship between plaintiff and defendants, defendants do not mention the evidence pertinent to this question, least of all cite the record on appeal to support this claim. Instead, defendants' only references to the record on appeal in support of this assertion are citations to plaintiff's complaint. Consequently, we construe defendants' assertion in this regard as a challenge solely to the sufficiency of that pleading.

Our discussion of defendants' challenge to the sufficiency of plaintiff's complaint will be brief. In his complaint plaintiff alleged, in pertinent part, that defendants "held [sic] a duty to plaintiff to deal fairly and in good faith with plaintiff in connection with his loan transactions with the Bank." The allegation regarding the "loan transactions," although cursory and conclusionary, nevertheless adequately alleges the requisite underlying contract between plaintiff and defendants. Moreover, any claimed lack of specificity in plaintiff's complaint with respect to the terms of the loan transactions, or contracts, in question was cured by the evidence plaintiff presented at trial, which we discuss below. In view of that evidence, the purported pleading defect could not have been prejudicial to defendants and, therefore, we reject defendants' challenge to the sufficiency of that pleading.

To the extent defendants purport to challenge the sufficiency of the evidence presented at trial to establish the requisite contractual relationship between plaintiff and defendants, we conclude defendants have waived any claim of error in that regard. As previously discussed, "one contending the evidence does not support some particular issue of fact

must set forth in his brief all the material evidence bearing upon that issue and not merely the evidence favorable to him; failure to so state the evidence shall be deemed a waiver of the claimed error." (Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co., supra, 66 Cal.App.3d at p. 152.) Defendants' blanket assertion, set forth above, that plaintiff did not present any evidence to establish defendants' breach of an existing contract between plaintiff and defendants clearly does not comport with the requirement of setting out all evidence presented on that contested issue. Moreover, defendants' assertion clearly is erroneous as revealed not only by plaintiff's recitation of the evidence presented at trial but also by defendants' own statement of relevant facts included in the introductory portions of defendants' brief.

According to the parties' respective recitations of the evidence presented at trial, plaintiff obtained a series of short term, interest only loans from RNB. Each loan was fully secured and approved personally by defendant Billings. During the course of the year preceding adoption of the bylaw, plaintiff occasionally, and perhaps even regularly, fell behind on monthly or quarterly interest payments on some or all of the four loans then outstanding. Plaintiff's delinquent payments apparently were the result of a cash flow problem plaintiff was then encountering in connection with his various business ventures. Despite plaintiff's apparent delinquent payments, defendant Billings routinely extended the due dates for plaintiff's payment of the principal owed on the loans in question, apparently on condition only that plaintiff was current on interest payments at the time plaintiff requested the extension. Defendants acknowledge, in their recitation of the pertinent evidence, that Billings, in fact, renewed or "rolled over" plaintiff's outstanding loans on numerous occasions and further acknowledge defendant Billings did so, at least during 1986, because Billings was aware of plaintiff's cash flow problems. That evidence, in our view, is sufficient to establish

either an oral agreement or an agreement implied from Billings' conduct that defendants, at the very least, would not refuse unreasonably to renew or extend plaintiff's outstanding loans while plaintiff's cash flow problem persisted and so long as plaintiff was current on the interest payments. In other words, there was evidence of an established course of conduct or implied contract between plaintiff and defendants which created a duty on the part of defendants to act in good faith and deal fairly with plaintiff in connection with renewing plaintiff's loans. Accordingly, we reject defendants' assertion that there was no evidence presented at trial to show defendants had an obligation to renew or extend plaintiff's loans.

We similarly reject defendants' purported claim there was no evidence presented at trial to show defendants breached that obligation. Again as set out above, plaintiff presented evidence at trial to show that in January 1987 Billings refused to extend plaintiff's then outstanding loans. While defendants apparently attempted to show Billings' refusal was reasonable, or in good faith, because plaintiff purportedly was delinquent in his loan payments, plaintiff, in turn, offered evidence to show the purported delinquency was the result of defendants' failure to credit plaintiff with a $4,000 loan payment plaintiff made in March 1986. Once credited, plaintiff was current on all payments on his then outstanding loans through January 18, 1987.[21] According to plaintiff's

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[21] With respect to defendants' purported accounting error in connection with the $4,000 payment, the trial court instructed the jury, "A breach of the implied covenant of good faith and fair dealing consists of action in bad faith by a party that is separate and apart from the contract with the motive to intentionally frustrate the other party's contract rights. A party does not breach the covenant of good faith and fair dealing if it acts with a reasonable good faith belief that it has the right to do so under the terms of the contract, even if it is mistaken." While defendants purport to challenge the accuracy of the first sentence

(continued...)

evidence, again as set out above, Billings' refusal to renew plaintiff's loans caused plaintiff to be in default on those outstanding obligations. Billings, in turn, relied on that default to invoke the disqualification provision under the bylaw defendants adopted in February 1987. That evidence, in our view, supports the jury's apparent finding that Billings' primary, if not sole, reason for refusing to renew plaintiff's loans was to create the default necessary to remove plaintiff from the board of directors. In other words, that evidence is sufficient to support the jury's implicit finding that defendants did not act reasonably, or in good faith, in refusing to renew plaintiff's loans and, therefore, breached the covenant of good faith and fair dealing implied in their agreement with plaintiff. In short, and contrary to defendants argument, the foregoing evidence is sufficient to support plaintiff's recovery for breach of the implied covenant of good faith and fair dealing in that such evidence establishes both the existence of an agreement, albeit either oral or implied-in-fact, between plaintiff and defendants and defendants' breach of the covenant of good faith and fair dealing implied in that agreement.

Because we conclude the evidence was sufficient to support the jury's implied finding of the requisite underlying agreement between plaintiff and defendants, we shall only briefly address defendants' additional claim that, as a matter of law, there was no fiduciary relationship between plaintiff and defendants. Defendants' contention in this regard apparently is directed at supporting their claim that they did not owe plaintiff a duty of good faith and fair dealing with respect to renewing plaintiff's loans in the absence of either a contractual

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[21](...continued)
of this instruction, a claim we address later in our discussion, we note this instruction here solely to indicate that the jury apparently rejected defendants' assertion that their failure to credit plaintiff with the payment in question was a mistake.

or fiduciary obligation. We have concluded, as set forth above, that there was sufficient evidence to support the jury's implied finding of a contractual obligation between plaintiff and defendants which, in turn, formed the basis for defendants' duty of good faith and fair dealing. Therefore, defendants' assertion regarding the absence of a fiduciary relationship and related fiduciary duty is irrelevant. Accordingly, and in summary, we reject defendants' general assertion that there is no cause of action for breach of the implied covenant of good faith and fair dealing in connection with RNB's loans to plaintiff.

Our conclusion regarding the sufficiency of the evidence presented at trial eliminates the need for us to discuss, at least in detail, defendants' various challenges to the jury instructions in connection with plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing. In this regard, defendants contend the trial court incorrectly instructed the jury that they "may find that the implied covenant of good faith and fair dealing created an obligation on the part of the lender to give the borrower advance notice of its intention to terminate the loans or its intentions to refuse to renew the loans if you find that such notice was necessary to ensure to plaintiff the benefits of his agreements with Riverside National Bank. Further, if you find that in order to ensure the benefits of the loan agreements to plaintiff it was necessary for the Bank to renew the loans a reasonable period of time to allow plaintiff to find a substitute lender or to provide plaintiff with a term loan, you may find that defendants breached the implied covenant of good faith and fair dealing in failing to give plaintiff the loans for that extended period."[22]

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[22] Defendants also complain that the trial court instructed the jury that "the bank's decision not to renew plaintiff's loans would have to be

(continued...)

Defendants' challenge to the foregoing instruction is based entirely on defendants' erroneous view that the evidence did not establish an obligation on the part of defendants to renew plaintiff's loans and, therefore, defendants did not owe plaintiff a duty of good faith and fair dealing in connection with those loans. As discussed previously, and contrary to defendants' repeated assertion, plaintiff presented evidence at trial from which the jury could find an oral or implied-in-fact agreement between plaintiff and defendants that defendants would not refuse unreasonably to renew plaintiff's loans while plaintiff's cash flow problem persisted and so long as plaintiff was current on his payments at the time such renewal was requested. Defendants, therefore, did owe plaintiff a duty of good faith and fair dealing in connection with the agreement regarding plaintiff's loans. The foregoing instruction, in our view, accurately identifies the nature and the scope of defendants' implied duty of good faith and fair dealing in that respect. Accordingly, we reject defendants' assertion that the foregoing instruction was erroneous.

Defendants also complain about various other instructions the trial court purportedly gave the jury in connection with plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing. We shall not discuss

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[22](...continued)
based upon `objective criteria and criteria upon which a reasonable loan officer, in the exercise of his discretion, would have adopted.'" In our view, that instruction is correct to the extent the instruction was intended to define the nature and extent of defendants' duty of good faith and fair dealing in connection with their oral or implied-in-fact agreement not to refuse unreasonably to renew plaintiff's loans. However, we shall not address the issue because defendants did not include a reference to the record on appeal to demonstrate the trial court, in fact, gave such an instruction. Therefore, defendants have not met their burden of demonstrating such purported error occurred. (Green v. City of Los Angeles, supra, 40 Cal.App.3d at p. 835.)

the instructions in question, first, because defendants, in raising these claims, do not include any references to the record on appeal to support their assertion the trial court gave the instructions in question and, therefore, have not met their burden of showing such error, in fact, occurred. In addition, defendants have not demonstrated the purported jury instructions were incorrect statements of law. Finally, even if we were to assume the trial court gave the instructions in question and were to assume, further, that such instructions were erroneous, defendants have not demonstrated the challenged jury instructions, individually or collectively, were "prejudicial (Code Civ. Proc., § 475) and resulted in a `miscarriage of justice.' (Cal. Const., art. VI, § 13.)" (Pool v. City of Oakland (1986) 42 Cal.3d 1051, 1069.) With respect to prejudice, defendants state only, "It is evident that there was no breach of the covenant of good faith and fair dealing in this case. The jury's conclusion to the contrary was obviously the result of the incorrect and misleading jury instructions given, and should not be permitted to stand." We previously addressed and rejected defendants' argument that the evidence was insufficient to show defendants breached the implied covenant of good faith and fair dealing. Consequently, we necessarily must reject defendants' claim of prejudice in connection with the jury instructions based on that repeated erroneous assertion.

In summary, defendants' claims of purported legal error in connection with plaintiff's cause of action based on defendants' breach of the implied covenant of good faith and fair dealing either are substantively meritless or procedurally defective. Therefore, we conclude the jury's liability finding in connection with that cause of action, as reflected in the jury's response to question number 3 of the special interrogatories, is free from defendants' claims of prejudicial error and, further, is supported by substantial evidence. Accordingly, we next must determine whether the damages the jury attributed

to that cause of action represent an item of compensable injury separate from the loss of construction business for which the jury compensated plaintiff in connection with plaintiff's cause of action for defamation.

B. The Jury's Breach of the Implied Covenant Damage Finding

According to the jury's response to question number 3(A) of the special interrogatories, the jury found the "total amount of damages suffered by plaintiff as a result of [defendants'] breach of the implied covenant of good faith and fair dealing" was $1,650,800. The instructions included in the general verdict with special interrogatories did not require the jury to identify the specific item or items of injury encompassed by the jury's various damage calculations. Instead, the jury was instructed, in connection with each theory of recovery, simply to "find . . . the total amount of damages suffered by plaintiff." Similarly, with the exception of the jury instructions in connection with plaintiff's defamation cause of action, the jury instructions in connection with plaintiff's theories of recovery did not include specific instructions on the pertinent measure of damages or otherwise inform the jury of the items of injury for which the jury could compensate plaintiff. Consequently, in order to determine whether the $1,650,800 represents a separate item of compensable injury we must look to the evidence plaintiff presented at trial with respect to damages.

Defendants acknowledge, albeit in the context of challenging such damages, that plaintiff offered evidence to show plaintiff suffered economic injury in the form of lost profits on the purported "forced sale" of his RNB stock as a result of defendants' refusal to renew plaintiff's loans. While defendants challenge plaintiff's right to recover damages for that alleged economic injury, which we address below, defendants do not dispute plaintiff presented evidence in

connection with that purported item of economic injury. We will discuss the details of plaintiff's evidence when we address defendants' challenges to plaintiff's claimed loss on the sale of his RNB stock. Our inquiry here is concerned only with the initial question of whether there was evidence presented at trial to support a damage award of $1,650,800 (the amount the jury attributed to plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing) as an item of injury separate from plaintiff's loss of construction business revenue. For that limited purpose, we note plaintiff offered evidence to show he sold his 250,690 shares of RNB stock to Hemet Bancorp (Hemet) for the book value of $6.44 per share. According to plaintiff's evidence, the value of that stock, presumably at the time plaintiff sold the shares to Hemet, was between $9.25 and $15 per share. Based on that evidence, in his closing argument, plaintiff requested damages of $2,271,251 resulting from his loss on the forced sale of his RNB stock.[23]

The foregoing evidence is sufficient to support the conclusion the jury's award of $1,650,800 represents compensation for plaintiff's purported loss on the sale of his RNB

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[23] Plaintiff apparently used a chart during closing argument to discuss plaintiff's various items of damage. In discussing the compensation plaintiff requested in connection with the loss on the sale of his RNB stock, plaintiff's counsel explained "what we did here [presumably referring to the chart] is we took the $6.44 a share and multiplied it times the number of shares that he had, 250,690. And then we took the difference between that and what he could have sold it for. And this is the loss. He lost $2,271,251." According to these figures, plaintiff apparently asked the jury to value his RNB stock at the time of the sale to Hemet at $14.48 per share, a difference of $9.05 per share over the $6.44 per share Hemet actually paid plaintiff.

stock.[24] That loss, in turn, represents an item of injury separate from plaintiff's loss of construction business revenue for which the jury compensated plaintiff in connection with plaintiff's defamation cause of action, as discussed above. Having concluded there was evidence presented at trial which would support the jury's $1,650,800 damage award as a separate item of injury, we next must determine whether that damage award is free from defendants' various claims of error and, further, is supported by substantial evidence.

As noted previously, defendants do not specifically challenge the damage awards included in the jury's responses to the special interrogatories but, instead, generally challenge the entire compensatory general damage verdict. In that context, defendants raise two claims which relate to the $1,650,800 damages the jury attributed to plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing. First, in the context of challenging the sufficiency of the evidence to prove defendants' actions proximately caused plaintiff's various items of injury, or damage, defendants contend "there was absolutely no evidence presented to show that plaintiff was compelled to sell his stock due to any act or omission of defendants." On this issue, defendants once again do not discuss all the evidence presented at trial pertinent to this question, but instead focus only on the evidence which arguably supports their claim. Defendants, therefore, are deemed to have waived their challenge to the sufficiency of the evidence. Moreover, plaintiff's brief recounts evidence presented at trial which, if the jury believed, is

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[24] In challenging the jury's compensatory damage award as excessive, defendants claim "the jury awarded plaintiff $1,622,000 for his alleged losses arising out of the sale of his [RNB] stock." Defendants do not explain the basis for this assertion nor do they include any citation to the record to support this claim. For reasons we assume now are obvious, we will not address this assertion.

sufficient to support the jury's implied finding that defendants' unreasonable refusal to renew plaintiff's outstanding loans proximately caused plaintiff's loss on the sale of his RNB stock. We briefly summarize that evidence to dispel defendants' contrary assertion.

According to plaintiff's evidence, as a result of defendants' refusal to renew or extend plaintiff's loans, defendants not only declared plaintiff in default on those obligations, but also effectively demanded immediate repayment of the entire amount owed on those outstanding obligations. Plaintiff, therefore, was obligated immediately to pay off the principal balance on those outstanding loans not only to eliminate the purported default but also to salvage his "financial position in the community." Defendants, according to the testimony of Billings as set out above, knew plaintiff had "cash flow problems," and therefore presumably knew it would be difficult for plaintiff to obtain the large amount of cash necessary to repay the outstanding loans in full. Plaintiff testified the RNB stock was the one large asset plaintiff could convert to cash in an amount sufficient to repay the loans in question. Plaintiff, therefore, entered into an agreement with Hemet to sell his shares of stock in RNB in order to obtain the funds necessary to repay those loans in full. Plaintiff apparently originally contacted Hemet in order to obtain a loan, secured by plaintiff's RNB stock, the proceeds of which plaintiff would then use to pay off the outstanding RNB loans. Hemet declined the loan but offered to purchase plaintiff's stock in RNB. Apparently because banking regulations precluded plaintiff from selling his entire block of RNB stock to Hemet without first obtaining regulatory approval, Hemet and plaintiff agreed to a transaction in which plaintiff immediately would sell 4.9 percent of his stock for cash, the balance to be sold upon receipt of the necessary regulatory approval. Hemet, in turn, agreed, as a condition of the sale, to loan, or advance, plaintiff the funds necessary to pay off plaintiff's

RNB loans, which amount apparently was to be credited against Hemet's ultimate purchase price for the stock. Hemet, purportedly recognizing plaintiff's "vulnerability," agreed to pay plaintiff book value of $6.44 per share. At trial, plaintiff offered evidence to show the value of his 250,690 shares of RNB stock was between $9.25 and $15 per share. Plaintiff testified he would not have sold his shares of RNB stock if he had not been compelled to do so in order to repay the RNB loans.

In our view, the foregoing constitutes substantial evidence to support the jury's implied finding that defendants' breach of the implied covenant of good faith and fair dealing by unreasonably refusing to renew or extend plaintiff's loans proximately caused the loss plaintiff incurred in connection with the forced sale of his RNB stock. We, therefore, reject defendants' purported challenge to the sufficiency of the evidence on that question.

In the context of challenging the entire compensatory general damage verdict on the basis of excessiveness, defendants' raise a second and final contention pertinent to the $1,650,800 damages the jury attributed to plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing and which amount we conclude is supported by the evidence regarding the loss plaintiff incurred in connection with the sale of his RNB stock. Specifically, defendants purport to challenge the expert testimony presented by plaintiff and upon which defendants contend the jury "presumably" relied in valuing plaintiff's RNB stock. In other words, defendants challenge the sufficiency of the evidence in support of the jury's damage calculation.

We will not discuss defendants' specific complaint because defendants have not cited the record on appeal to support the assertion upon which their challenge to the sufficiency of that evidence depends. Specifically, defendants

complain plaintiff's expert witness "incorrectly assumed that plaintiff's 13.4% ownership interest in [RNB] represented a controlling interest in the bank" and, further, relied on that "faulty premise" in valuing plaintiff's RNB stock. While defendants' discussion of this claim includes some citations to the record on appeal, defendants do not include a citation to that portion of record which supports their claim the expert's opinion was based on the purported "faulty premise."[25] In short, defendants have not demonstrated error occurred in the trial court and, therefore, have not demonstrated the insufficiency of the evidence to support the jury's calculation of damages.

In summary, we conclude defendants have not demonstrated either the legal invalidity or factual insufficiency of the jury's apparent finding that defendants' breach of the implied covenant of good faith and fair dealing proximately caused the injury plaintiff suffered as the result of the forced sale of his RNB stock. We further conclude defendants similarly have failed to demonstrate the evidence was insufficient to support the jury's calculation of the damage plaintiff incurred as the result of that injury. Accordingly, and for the reasons discussed, we conclude the jury's damage award of $1,650,800 based on defendants' breach of the implied covenant of good faith and fair dealing represents a separate item of damage

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[25] The only reference to the purported "faulty premise" included in those portions of the record cited by defendants is contained in a statement by defense counsel during an apparent side bar conference. Defense counsel's statement clearly is not evidence, and in any case, the jury did not hear that statement and therefore could not have considered it in reaching their verdict. Moreover, defense counsel's statement does not include sufficient information to enable this court to locate the pertinent aspects of the expert's purported testimony regarding the valuation of plaintiff's RNB stock. We decline to read the expert's entire testimony to determine whether it includes the purported "faulty premise" about which defendants complain.

which is free from defendants' claims of prejudicial error and which, further, is supported by substantial evidence.

We next address defendants' contention that the trial court failed adequately to instruct the jury on plaintiff's duty to mitigate his damages. That contention, in our view, is the only remaining issue defendants raise in this appeal which directly or indirectly relates to the jury's damage findings in connection with plaintiff's causes of action for defamation or breach of the implied covenant of good faith and fair dealing.[26]

3.

MITIGATION OF DAMAGES INSTRUCTION

Defendants contend the trial court gave inadequate instruction to the jury on plaintiff's duty to mitigate his damages, a contention we identified as issue number seven, above. Specifically, defendants contend the trial court erred in giving only one instruction on the duty to mitigate damages rather than the three instructions requested by defendants. Here again, we disagree.

With respect to plaintiff's duty to mitigate his damages, the trial court instructed the jury, "Defendants are not required to compensate plaintiff for any expenses plaintiff could have

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[26] We will not address defendants' general assertion that the jury's total compensatory damage award was excessive because we addressed those aspects of that claim which relate to plaintiff's recovery for defamation and breach of the implied covenant of good faith and fair dealing. In doing so, we concluded the evidence was sufficient to support both the fact of plaintiff's injury and the amount of damage the jury awarded plaintiff in connection with those two theories of recovery. The damages the jury attributed to those two theories of recovery, in turn, collectively exceed the total compensatory damage award. Therefore, we necessarily must reject defendants' assertion the compensatory damage award was excessive.

avoided by a reasonable effort." Defendants do not claim this instruction is an inaccurate or erroneous statement of the law. Instead, defendants argue, in effect, that their three requested instructions more fully explained to the jury the legal principle of mitigation.[27] In other words, defendants contend only that their proposed jury instructions were better than the instruction on mitigation of damages given by the trial court.

Our function is to determine whether error occurred and not to evaluate quality of performance. Defendants do not challenge the accuracy of the mitigation instruction given by the trial court but, instead, only contend that their requested instructions better stated the pertinent legal principles. Defendants, therefore, have not demonstrated any error and we need not address defendants' argument in this regard. In short, the trial court instructed the jury on plaintiff's duty to mitigate his damages, as defendants concede, therefore, no error occurred.

In accordance with the guidance the Supreme Court provided in Tavaglione v. Billings, supra, we have addressed each of defendants' various challenges to the jury's liability and damage findings in connection with plaintiff's causes of action for defamation and breach of the implied covenant of good faith and fair dealing. We conclude, for the reasons set

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[27] The three instructions defendants requested and the trial court refused are as follows:

"Where damage to person or property is threatened or inflicted by either breach of contract or tort, the injured party has the active duty to use reasonable care and diligence to protect himself and minimize the loss. If plaintiff, by his own neglect, unnecessarily enhances the damages, he cannot recover the excess."

"Plaintiff cannot recover for alleged expenses incurred in connection with his construction business which he could have avoided by reasonable effort, or which resulted from his own neglect."

"Plaintiff is not entitled to recover damages for alleged losses arising from the sale of his Bank stock in excess of those losses he could have minimized by using reasonable care."

out above, that the damages the jury awarded plaintiff in connection with those two theories of recovery, as evidenced by the jury's responses to the damage special interrogatories, represent compensation for separate items of compensable injury suffered by plaintiff. We further conclude, as discussed above, the jury's liability and damage findings in connection with those two causes of action are free from defendants' claims of prejudicial error and are supported by substantial evidence. Accordingly, we conclude the jury's general damage verdict of $2,254,787 is supported by the jury's liability and damage findings in connection with plaintiff's causes of action for defamation and breach of the implied covenant of good faith and fair dealing.[28] Our conclusion in this regard, as we have previously discussed, eliminates the need for us to determine whether other theories of recovery pursued by plaintiff at trial also support the general damage verdict. Accordingly, we need not and therefore will not address defendants' challenges to those other theories of recovery.

The remaining issues raised by defendants in this appeal, as noted above, are directed at attacking the punitive damage award, the fairness of the trial and the trial court's action granting plaintiff's motion for attorneys' fees. We

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[28] The damages the jury attributed to plaintiff's causes of action for defamation and breach of the implied covenant of good faith and fair dealing collectively exceed the jury's total general damage verdict by $800. Plaintiff, however, did not raise this apparent discrepancy in the trial court and, further has not raised the issue on appeal. Moreover, it occurs to us that the difference between the general verdict and the various damage amounts the jury included in their responses to the special interrogatories is the direct result of the confusing instructions included in the general verdict with special interrogatories form submitted to the jury. The record reveals plaintiff, at the very least, did not object to that form and may actually have been responsible for its preparation. We therefore conclude plaintiff has waived any error based on the discrepancy in question.

address each of those contentions in the remaining sections of this opinion.

4.

PUNITIVE DAMAGES AWARDS

We next address defendants' contentions pertinent to the jury's punitive damage award, issue number nine, above. In this regard defendants contend that such award was improper, first, because defendant RNB, as a federally chartered bank, was an instrumentality of the federal government and as such was immune from liability for punitive damages. Next, defendants contend the jury's award of punitive damages was improper because there was evidence that defendants, in adopting the bylaw which disqualified plaintiff from continuing to serve on the board of directors of RNB, relied on advice of counsel. Finally, defendants contend the punitive damage awards against RNB and Billings were excessive as a matter of law and as such constitute a taking of property without due process of law.

A. Immunity

Our discussion of defendants' immunity contention will be brief. Once again, defendants' discussion of this assertion does not mention whether and if so at what point defendants raised this assertion in the trial court. Presumably, immunity from liability for punitive damages is an affirmative defense and logically would have been raised by defendants in some manner prior to trial, ideally by way of a motion to strike the punitive damage allegation contained in plaintiff's amended complaint. Our review of the record reveals defendants did not challenge the punitive damage allegation in any manner prior

to trial.[29] In other words, defendants permitted the issue of punitive damages to be presented to jury without apparent objection and therefore presumably waived the assertion.

RNB asserted, belatedly in our view, the defense of immunity in defendants' collective motion for new trial. Assuming RNB did not waive the assertion, as above noted, we nevertheless conclude the contention lacks merit. RNB cites extensive authority for the general proposition that the federal government and its instrumentalities are immune from liability for punitive damages. However, RNB does not provide any authority to support the specific proposition that federally chartered national banks such as RNB, merely by virtue of their federal charter, are instrumentalities of the federal government and, therefore, similarly are immune from such liability. As plaintiff points out, numerous cases, albeit without expressly discussing the immunity issue, uphold punitive damage awards against national banks. (See, e.g., Sanchez-Corea v. Bank of America (1985) 38 Cal.3d 892, 909.)

Accordingly, for either or both of the foregoing reasons, we conclude the immunity contention lacks merit.

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[29] In reviewing the record, we have not read each of the 4,000 pages of the joint appendix in lieu of clerk's transcript and exhibits. We have, however, reviewed the 11 pages of index to the joint appendix to determine whether the title of any motion made by defendants prior to trial included the immunity assertion. The index reveals defendants did not file a written motion to strike the punitive damage allegation. Nor is the immunity contention asserted by defendants in their demurrer to plaintiff's amended complaint or motion for summary adjudication of issues. In fact, defendants did not even raise immunity as one of the affirmative defenses in their answer to plaintiff's amended complaint. We decline to read the more than 3,300 pages of reporter's transcript to determine if defendants orally moved to strike or otherwise challenge the punitive damage allegation on the basis of purported immunity.

B. Advice of Counsel

Defendants' second attack on the punitive damage awards is equally unavailing, although for different reasons. Defendants here contend the punitive damage issue should not have been submitted to the jury in light of the evidence defendants relied on the advice of counsel in enacting the bylaw which removed plaintiff from the board of directors. In other words, defendants contend advice of counsel if not a complete defense, at the very least, demonstrates defendants acted in good faith in adopting the bylaw, and thus negates malice.

Here, yet again, defendants do not mention whether this contention was raised in the trial court and if so in what context and manner. We shall not belabor that defect here because it is expedient to note, assuming the contention was raised below, it would not apply to the defamation theory of recovery. As the above-emphasized language indicates, this assertion, assuming it was raised below and further assuming it is an accurate statement of the law, would apply, if at all, to the first count for purported illegal ouster and punitive damages awarded in connection therewith. Defendants do not suggest their statements to the press, as recounted in the newspaper, were made on the advice of counsel thereby establishing defendants' good faith and concomitantly negativing malice in connection with the defamation count.

Moreover, the trial court, presumably at defendants' request, instructed the jury that, "Plaintiff cannot recover punitive damages where defendant acted in good faith reliance on the advice of counsel." The jury, as evidenced not only by the malice findings in connection with each theory of recovery but also by the punitive damage award, obviously found the actions of RNB and Billings, in connection with adoption of the bylaw and in all other respects, were not the result of good faith reliance on the advice of counsel. We are bound by this

implied finding absent a showing by defendants that it is against the weight of the evidence or legally erroneous. Defendants have not so shown. Consequently, for each of these reasons, we conclude defendants' contention regarding advice of counsel is meritless.

C. **Excessiveness**

As a final challenge to the punitive damage award defendants assert the award was excessive in light of defendants' conduct and net worth, and as such, constitutes an unconstitutional taking of defendants' property without due process of law. Again, defendants do not mention whether this assertion was raised in the trial court. We have determined defendants have preserved this issue for review on appeal by raising it in both their motion for judgment notwithstanding the verdict and motion for new trial. Correctly stated, the issue raised by defendants is whether the trial court abused its discretion in denying either defendants' motion for judgment notwithstanding the verdict or motion for new trial with respect to the punitive damage award on the grounds set forth above. We conclude, as we shall explain, that the trial court did not abuse its discretion.

The pertinent facts, as mentioned above, are after the jury returned its general verdict finding liability under each theory of recovery plaintiff pursued at trial and further finding the total amount of damage plaintiff suffered in connection with each such theory of recovery, the jury then considered the issue of punitive damages. On this issue, the jury returned a verdict awarding plaintiff punitive damages of $2,300,000 against RNB and $130,000 against Billings. The punitive

damage awards apparently represent one year's income for RNB and one year's salary for Billings.[30]

Defendants, in connection with a different issue and in an earlier portion of their brief, contend the punitive damage award must be reversed because it is impossible to determine whether that award was based upon the defamation cause of action or improperly attributed to plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing. In support of this assertion, defendants rely on Lanouette v. Ciba-Geigy Corp. (1990) 230 Cal.App.3d 889. On December 3, 1990, after defendants filed their opening brief in this appeal, the California Supreme Court granted review of Lanouette. (See Lanouette v. Ciba-Geigy Corp. (1990) 222 Cal.App.3d 1094.) Consequently, Lanouette is no longer citable authority or "good law." Because defendants do not cite any other authority to support this contention, we shall not address it, other than to note, in our view, that portion of the Lanouette opinion relied on by defendants was decided wrongly.[31] In short, we conclude the jury's punitive damage

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[30] We were unable to locate that portion of the record which supports this assertion. The financial statements of both RNB and Billings contained in the exhibit portion of the joint appendix, and cited by plaintiff to support the foregoing assertion, do not expressly identify the annual income of either defendant. However, because defendants neither discuss nor refute the portion of plaintiff's brief which includes this assertion, we assume the assertion is an accurate statement of the evidence presented in the trial court.

[31] The Lanouette court concluded, because the plaintiff in a wrongful termination of employment action was not entitled, as a matter of law, to recover tort damages for breach of the implied covenant of good faith and fair dealing, the punitive damage award, although correct under plaintiff's intentional infliction of emotional distress theory of recovery, had to be reversed because it could not be determined which theory of recovery the jury relied on in awarding punitive damages.

(continued...)

award is properly attributed to plaintiff's defamation cause of action based on the jury's finding, set out above, that defendants acted with malice or oppression in connection with that theory of recovery.

Turning to defendants' assertion that the punitive damage awards were excessive and, therefore, the trial court abused its discretion in denying defendants' motion for new trial, "It is a well-settled rule that after an exemplary damage award has been approved by the trial court with the denial of a motion for new trial, as in this case, the reviewing court will declare the amount excessive only if, upon a review of the entire record, the award must be said to be so grossly excessive as to indicate passion or prejudice on the part of the jury [citations]." (Roemer v. Retail Credit Co. (1975) 44 Cal.App.3d 926, 937.) Stated otherwise, "our review of punitive damage awards rendered at the trial level is guided by the 'historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice. . . .' [Citation.]" (Neal v.

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[31](...continued)
According to the Lanouette court, and relying exclusively on Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal.App.2d 268, "Where a jury verdict is erroneous in one part and the award of damages is not reasonably subject to separation, the judgment on that issue must be reversed." (Lanouette v. Ciba-Geigy Corp., supra, 230 Cal.App.3d at p. 908.) Di Giorgio, in turn, holds that because the purpose of punitive damages is to punish a defendant for his or her own wrongful conduct, a punitive damage award in a lump sum, jointly and severally, against multiple defendants in a defamation action "is not reasonably subject to separation" and therefore must be reversed. (Di Giorgio Corp. v. Valley Labor Citizen, supra, 260 Cal.App.2d at p. 276-277.) In our view, the holding in Di Giorgio does not support the conclusion arrived at by the court in Lanouette and clearly has no pertinence in this appeal where, as set out above, the jury separately awarded punitive damages against RNB and Billings.

Farmers Ins. Exchange (1978) 21 Cal.3d 910, 927, quoting Bertero v. National General Corp. (1974) 13 Cal.3d 43, 65, fn. 12.)

According to Neal v. Farmers Ins. Exchange, the factors reviewing courts should consider to determine whether punitive damage awards are excessive are "[1] the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. . . . [2] the amount of compensatory damages awarded; in general even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered is small. . . . [3] Also to be considered is the wealth of the defendant; obviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. . . . By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (Neal v. Farmers Ins. Exchange, supra, 21 Cal.3d at p. 928.)

Viewing the instant case according to the foregoing factors, we cannot conclude, as a matter of law, that the punitive damage awards here in question were excessive. In this regard we note the trial court instructed the jury according to the foregoing factors and we must presume, absent evidence to the contrary, the jury followed that instruction and considered the reprehensibility of defendants' defamatory statements as well as defendants' financial condition in calculating the amount of the respective punitive damage awards.

Defendants argue their conduct was not reprehensible and assert, as apparently they have from the inception of this litigation, that in adopting the bylaw and informing sharehold-

ers of plaintiff's purported loan defaults, "the defendant directors were fulfilling their duties as fiduciaries of the bank." The jury, and later the trial court in ruling on defendants' motion for new trial, apparently determined otherwise. More significantly, in this connection defendants do not discuss the reprehensible nature of the various defamatory statements regarding both the fact and amount of plaintiff's purported loan defaults as set forth in the newspaper articles and proxy statement. We interpret defendants' silence on this point either as a significant omission or an implicit admission that such conduct was sufficiently reprehensible to support the punitive damage verdict.[32]

Likewise, defendants do not discuss the wealth factor. Here, again, we view defendants' silence as an implicit admission that the amounts of the respective punitive damage awards against RNB and Billings, which as above noted, equate to one year of income for each defendant, do not run afoul of this factor. We similarly reject defendants' statement, unaccompanied by any discussion, that the amounts of the respective punitive damage awards are disproportionate to the compensatory damage award. As plaintiff points out, the combined total of the punitive damage awards is $2,430,000, which is nearly equal to the compensatory damage award of $2,254,787. We cannot say as a matter of law that a ratio of

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[32] For this same reason, we reject defendants' suggestion that the punitive damage awards are not supported by substantial evidence. While defendants discuss the pertinent legal principle, they fail to discuss the pertinent evidence, or lack thereof. We again take defendants' failure as an implicit admission that the evidence set out above in our discussion of the defamation cause of action is sufficient to support the punitive damage award.

one to one is disproportionate. In fact, common sense and logic suggest quite the opposite conclusion.[33]

In summary, we conclude the punitive damage awards comport with each factor enunciated in Neal and as such cannot be said to be excessive as a matter of law.

As a final challenge to the punitive damage awards defendants assert the awards in this case violate the due process clause and therefore are unconstitutional. In support of this assertion, defendants rely on Browning-Ferris Industries v. Kelco Disposal, Inc. (1989) 492 U.S. 257, 109 S.Ct. 2909, 2921, where the United States Supreme Court declined to address a due process challenge to a punitive damage award after first noting that, "The parties agree that due process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was reached in proceedings lacking the basic elements of fundamental fairness."[34]

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[33] It occurs to us, in view of Foley v. Interactive Data Corp., supra, that defendants should have requested the trial court to instruct the jury that for purposes of calculating the punitive damage awards, the jury should not consider the compensatory damages the jury attributed to plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing. Defendants do not contend they requested such an instruction and, further, do not challenge the punitive damage award on that basis. Moreover, even if we were to consider only the $604,787 the jury awarded plaintiff in connection with the defamation cause of action, we nevertheless cannot say, as a matter of law, that the ratio of those damages to the punitive damage awards is disproportionate.

[34] The Supreme Court apparently is retreating from its due process analysis in connection with punitive damage awards as evidenced by the court's recent decision in TXO Production Corp. v. Alliance Resources Corp (1993) _ U.S. _, 113 S.Ct. 2711, where the court rejected a due process challenge to a punitive damage award of $10 million where the compensatory damage award amounted only to $19,000, a ratio of 526 to one.

Relying on the foregoing language, and similar language in other cases, defendants contend the trial below "was a blatant denial of procedural safeguards to the defendants . . . . The [trial] court's rulings which permitted the admission of evidence which was highly prejudicial to the defendants, but excluded evidence which would have enabled the defendants to overcome the prejudice caused by such erroneously admitted evidence, and the innumerable erroneous jury instructions given, all bear ample testimony to this fact. The award of punitive damages violated the defendants' right to due process of law . . . ."

The problem we have in addressing this contention is one repeated throughout defendants' brief -- the total absence of any reference to, least of all discussion of, the purportedly erroneous evidentiary rulings and jury instructions. Presumably, defendants' assertions relate to purported erroneous evidentiary rulings and jury instructions identified by defendants in earlier portions of their brief, specifically, in the sections entitled "The Numerous Erroneous Evidentiary Rulings Made by the Trial Court" and "The Jury Instructions." In these sections, defendants identify the evidentiary rulings and jury instructions about which defendants purport to complain but defendants do not discuss how or why such rulings and jury instructions were erroneous. In other words, defendants have failed to demonstrate error occurred.

Moreover, we generally are not persuaded by the argument that the trial court admitted evidence "highly prejudicial" to one of the parties. Presumably, all evidence presented by one side of a lawsuit is probative and in that sense prejudicial to the other side. The relevant inquiry is whether such evidence was otherwise inadmissible or whether the probative value of the evidence substantially is outweighed by the prejudicial effect. (See Evid. Code, § 352.) In short, defendants have not raised the pertinent and legally cognizable

arguments on appeal. We, therefore, reject each of defendants' purported challenges to the jury's punitive damage awards.

5.

DENIAL OF A FAIR TRIAL

We reject defendants' assertion, raised as a separate contention in this appeal and identified as issue number 10, above, that "the demeanor and conduct of the trial judge, together with his partiality to plaintiff's case, deprived defendants of the right to a fair trial." Here, again, defendants identify the various ways in which defendants contend the trial court revealed purported bias in favor of plaintiff but, in doing so, defendants do not demonstrate error occurred. For example, defendants assert "the trial court's prejudicial predisposition became apparent on the very first day of trial when it ruled on the parties [sic] motions in limine. The trial court granted plaintiff's motion in limine to exclude the most probative and exculpatory evidence on Mr. Billings's [sic] absence of malice against the plaintiff. However, the court denied defendants' motion in limine and allowed the plaintiff to testify on the same malice issue, and as to events which occurred over 20 years prior to the time of trial." Ignoring defendants' failure to identify the purportedly "probative and exculpatory evidence" in question, apparently inviting this court to extract that information either from defendants' 119-page brief or the 7,000-page record, defendants have not shown that any error occurred.

In short, defendants' claim of purported bias consists of a laundry list of instances during trial in which the trial court ruled or acted in favor of plaintiff and against defendants. Among other things, defendants point to the fact that the trial court (1) permitted plaintiff's counsel to engage in "strong" opening argument without interruption from the bench but interrupted defendants' counsel at the start of defense opening argument and, in a side bar conference, directed there be no further argument; (2) interrupted defense counsel during cross-examination of plaintiff regarding the sale of plaintiff's

RNB stock to Hemet BanCorp and terminated that cross-examination pursuant to Evidence Code section 352, later relenting and allowing defendants only 30 minutes additional time to complete questioning on this "major aspect of damages"; and (3) the trial court admitted into evidence nine of ten trial exhibits challenged by defendants and later, after plaintiff's counsel complained, relented and admitted the tenth exhibit.

Defendants cite additional instances in which the trial court ruled against defendants apparently to support their view that the only plausible explanation for the trial court's numerous rulings in favor of plaintiff and against defendants is that such rulings were erroneous. We will not recount each of the remaining instances cited by defendants because we reject defendants' implication and suggest another plausible and probable explanation for the trial court's action is that defendants' assertions, below, may not have been supported by the law. In short, we need not determine whether the trial court properly ruled in each instance cited by defendants because defendants have not made the threshold showing that any of the rulings in question was erroneous. Accordingly, we reject the assertion that defendants were denied a fair trial and that the trial court, as evidenced by nothing more than the number of rulings in favor of plaintiff, was biased against defendants from the outset of the trial.

6.

ATTORNEYS' FEES AWARD

The final contention we must address in this appeal is defendants' claim the trial court erred in granting plaintiff's motion for attorneys' fees pursuant to Code of Civil Procedure section 1021.1. That section, as defendants acknowledge, applies only to certain counties, including Riverside, and permits the trial court to award reasonable attorneys' fees, "in an amount to be determined in the court's discretion," to the

prevailing party in a civil suit "if all of the following conditions are met:

"(1) The party has made an offer for judgment under Section 998.

"(2) That offer was not accepted within the time provided in Section 998.

"(3) The party to whom the offer was made failed to obtain a more favorable judgment. . . ." (Code Civ. Proc., §1021.1, subds. (a) & (b).)

In pursuing this contention on appeal, defendants do not challenge the foregoing conditions, thereby conceding plaintiff made the required statutory offer which defendants rejected and after which defendants failed to obtain a more favorable judgment.[35] Instead, defendants argue only that they acted reasonably in rejecting plaintiff's statutory offer and, therefore, the trial court erred in awarding attorneys' fees to plaintiff.

On the issue of reasonableness, Code of Civil Procedure section 1021.1, subdivision (c) provides in pertinent part that, "In exercising its discretion to award attorney's fees the court shall consider the following factors:

"(1) The reasonableness or lack thereof, of a party's failure to accept an offer for judgment under Section 998 in light of the facts known to the party at the time, of [sic] which, in light of all of the circumstances, should have been known to the party. Reasonableness shall be determined by a consideration of at least the following matters:

"(A) The then apparent merit or lack of merit in the claim that was the subject of the action.

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[35] Two weeks prior to trial, plaintiff made a Code of Civil Procedure section 998 offer of $980,000.

"(B) The closeness of the questions of fact and law at issue.

"(C) Whether the offeror has unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer.

"(D) Whether the action was in the nature of a 'test case,' presenting questions of far-reaching importance affecting nonparties.

"(E) The relief that might reasonably have been expected if the claimant should prevail.

"(F) The amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

"(G) Those other matters that the court may deem relevant in the interest of justice."

In addressing this issue, defendants preface their discussion with the statement that, "Applying each of those factors to the instant case, it is evident that the award of attorney's fees to the plaintiff was totally unwarranted." Defendants' discussion, charitably characterized, focuses on only four of the seven factors set out above, and, therefore, belies that prefatory statement. Specifically, defendants argue the reasonableness of rejecting plaintiff's section 998 offer, first, because "defendants reasonably believed that their conduct which gave rise to this suit [enactment of the bylaw which removed plaintiff from the RNB board of directors] was governed by federal law" and, therefore, presumably was lawful. In this regard, defendants assert they adopted the bylaw after consultation with legal counsel and out of legitimate concern over plaintiff's chronic loan defaults which jeopardized "the overall welfare of an otherwise exemplary bank." Next, defendants argue that, "The enormous amount of damages awarded to plaintiff is due in large measure to his

success on his fourth cause of action for breach of the [implied] covenant of good faith and fair dealing" which defendants contend they reasonably believed did not pertain to them in light of Foley v. Interactive Data Corp., supra. Thirdly, defendants argue that plaintiff, despite timely discovery requests, did not provide defendants with documentation to "substantiate" plaintiff's "loss of construction business," therefore, plaintiff failed to provide information necessary for defendants to evaluate the reasonableness of plaintiff's offer. Finally, defendants assert "the dearth of cases dealing with the liability of banks in this context makes it a test case,' whose determination will have far reaching importance for nonparties."[36]

We reject each of defendants' assertions. In addressing defendants' various claims, we note, at the outset, that an award of attorneys' fees under Code of Civil Procedure section 1021.1 is directed to the discretion of the trial court and, as with all such discretionary matters, will not be reversed on appeal absent a clear showing of prejudicial abuse. (See Mission Imports, Inc. v. Superior Court (1982) 31 Cal.3d 921, 932.) Defendants have not made such a showing.

On this issue defendants again fall victim to their persistent refusal to recognize plaintiff pursued his action below under various theories of recovery, any one of which, if valid, might have subjected defendants to significant liability

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[36] Defendants also note under Code of Civil Procedure section 1021.1, it is only attorneys' fees incurred from the date of plaintiff's offer to settle a month before trial which can be awarded. Although defendants, by making this assertion, imply the trial court awarded plaintiff attorneys' fees for a period greater than that authorized by statute, defendants do not demonstrate the trial court actually did so. Moreover, even if such error occurred, it would not negate an otherwise proper attorneys' fee award but only would require reduction of that award.

for damages. Consequently, while defendants reasonably may have believed their action in adopting the bylaw was lawful and otherwise legitimate, that belief does not similarly justify the conduct underlying plaintiff's defamation theory of recovery. Because defendants do not attempt to demonstrate that each of plaintiff's various theories of recovery lacked merit (Code Civ. Proc., § 1021.1, subd. (c)(1)(A)) or that each such theory involved close questions of fact and law (Code Civ. Proc., § 1021.1, subd. (c)(1)(B)) defendants have failed, at least with respect to those factors, to demonstrate the trial court clearly abused its discretion in granting plaintiff's attorneys' fees motion. Moreover, defendants cannot make the required showing because we have already determined that at least two of plaintiff's theories of recovery are valid and do not involve close questions of fact and law.

Defendants' assertion with respect to Foley v. Interactive Data Corp., supra, in our view, is disingenuous. Contrary to defendants' suggestion in the opening paragraph of their discussion of this theory of recovery, Foley does not immunize defendants from liability for breach of the implied covenant of good faith and fair dealing. Simply put, and as discussed above, Foley holds the covenant of good faith and fair dealing is an implied contract term the breach of which generally will only support recovery of contract damages rather than tort damages. Despite defendants' numerous claims of error in this appeal, defendants do not challenge the damages the jury awarded plaintiff in connection with plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing on the basis of Foley. Instead, and as discussed at length above, defendants claim only that the facts presented at trial did not establish defendants' liability for breach of the implied covenant of good faith and fair dealing. In short, defendants do not claim the damages the jury attributed to that cause of action represent improper tort damages rather than contract damages. Defendants' failure to raise that issue in this

appeal not only constitutes a waiver of that claim but, in our view, also suggests defendants did not "reasonably" believe Foley precluded plaintiff from pursuing a cause of action against defendants based on breach of the implied covenant of good faith and fair dealing.

Defendants' discussion of the two remaining factors purportedly relied on by defendants to support their "reasonableness" assertion is devoid of detail. Defendants do not expressly discuss the "documentation" or "information" plaintiff purportedly failed to produce to substantiate plaintiff's damage claim for loss of business and which defendants claim was necessary to evaluate the reasonableness of plaintiff's offer under Code of Civil Procedure section 1021.1, subdivision (c)(1)(C). Our review of the portions of the reporter's transcript cited by defendants to support this argument reveals defendants attempted to obtain documentation, including non-discoverable, privileged information such as tax returns, regarding plaintiff's claimed loss of business by serving plaintiff with a subpoena duces tecum on the first day of trial. In response to plaintiff's motion to quash that subpoena, defendants attempted to explain and presumably justify the undisputed lateness of their discovery request by pointing out that plaintiff did not provide sufficient information in response to pertinent interrogatories propounded by defendants. According to the discussion in the record, other than the last minute subpoena duces tecum, defendants did not otherwise request document production from plaintiff during the course of pretrial discovery. In short, the portion of the record relied on by defendants does not support defendants' claim that plaintiff unreasonably refused to furnish information regarding his

claimed business losses but instead reveals defendants did not request that documentation in a timely manner.[37]

Finally, defendants attempt to characterize this litigation as a "test case" due to the "dearth of cases dealing with liability of banks in this context" similarly is devoid of discussion and merit. Because defendants rely on this assertion without undertaking any discussion we must assume defendants' "test case" argument pertains to defendants' assertion, previously discussed, that federally chartered banks are instrumentalities of the federal government and therefore are immune from liability for punitive damages. We rejected that argument when earlier raised by defendants and do so again here.

Defendants, in our view, simply have failed to demonstrate the trial court clearly abused its discretion in granting plaintiff's motion for attorneys' fees under Code of Civil Procedure section 1021.1. Accordingly, we conclude defendants' contention in that regard wholly is meritless.

REQUESTS FOR JUDICIAL NOTICE

During the pendency of this appeal, defendants and plaintiff requested this court to take judicial notice of various documents. We reserved ruling on each request for judicial

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[37] Defendants also cite a "best evidence" objection raised by defendants during plaintiff's trial testimony regarding the value of plaintiff's construction business during the period from May 1, 1986, through April 30, 1987, to support the claim that plaintiff unreasonably withheld information necessary to evaluate plaintiff's claimed business losses. The trial court correctly overruled that objection apparently recognizing plaintiff was qualified to express an opinion regarding the value of his business and "best evidence" simply was not pertinent. Documents substantiating plaintiff's opinion are not foundational, as defendants apparently contend, but merely go to the weight of plaintiff's opinion. Moreover, defendants' objection does not support the inference defendants would have us draw.

notice for decision with the appeal and here address those requests.

Defendants fired the first shot in the judicial notice volley on December 11, 1990, by asking this court to take judicial notice, first, of the Government Accounting Office report to Congress, dated September 1990 entitled "Bank Insurance Fund -- Additional Reserves and Reforms Needed to Strengthen the Fund" and, second, of a purported "legislative analysis of Corporations Code section 303, subdivision (c)." According to defendants, judicial notice of the fact and content of both documents is permitted under Evidence Code section 452, subdivisions (c) and (h), pertaining, respectively, to official acts of the legislative, executive and judicial branches of state and federal governments and facts and propositions not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of indisputable accuracy.

Plaintiff returned fire on January 18, 1991, relying on the same subdivisions of Evidence Code section 452 cited by defendants in their request for judicial notice, by requesting this court take judicial notice of the 1989 Annual Report of Riverside National Bank.

Defendants fired the last shot on January 22, 1992, by requesting this court take judicial notice of various liens filed in Riverside County Superior Court against any judgment plaintiff might receive in the lawsuit which is the subject of this appeal. In connection with this final request for judicial notice, defendants relied on Evidence Code section 452, subdivision (d)(1) (pertaining to records of any court of this state) and subdivision (h), discussed above.

We deny each of the requests for judicial notice filed by defendants and plaintiff. In doing so, we resist the temptation to discuss in detail the frivolous nature of each request. We content ourselves with pointing out that each request for

judicial notice pertains to evidence which was not presented in the trial court and, therefore, is irrelevant to any of the issues raised in this appeal.

Moreover, the Evidence Code sections relied on by both sides permit us to take judicial notice only of the documents in question but not their content. In other words, we could, for example, judicially notice the fact that the GAO issued a report to Congress in September 1990 regarding the Bank Insurance Fund but we cannot take judicial notice of the content of that report. Similarly, we could take judicial notice of the fact that RNB issued an Annual Report in 1989 and the fact that various liens were filed in the trial court. Presumably, neither defendants nor plaintiff are aided by our limited ability to take judicial notice only of the existence of the documents in question. Instead, the parties' apparent arguments depend on our ability to judicially notice the content of the documents in question. Accordingly, and in any case, each request for judicial notice is denied.

ATTORNEY'S FEES ON APPEAL

Following retransfer of this matter by the Supreme Court, plaintiff filed a combined motion to dismiss defendants' appeal and for an award of attorneys' fees. We denied the motion to dismiss but reserved ruling on the attorney's fees request, which we now address.

Plaintiff's request for attorneys' fees on appeal is based on Code of Civil Procedure section 1021.1, the statute under which the trial court awarded attorneys' fees to plaintiff, as discussed above. That code section does not expressly provide for the recovery of attorneys' fees on appeal. Therefore, the issue presented here, broadly stated, is whether we should construe Code of Civil Procedure section 1021.1 to include recovery of attorneys' fees on appeal.

"[C]ase law . . . has established the general principle that statutes authorizing attorney fee awards in lower tribunals include attorney fees incurred on appeals of decisions from those lower tribunals." (Morcos v. Board of Retirement (1990) 51 Cal.3d 924, 927; see also, People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater (1985) 165 Cal.App.3d 378, 387, in which this court held, "Where attorney's fees are authorized by statute they are authorized on appeal as well as in the trial court.") The cited "general principle," in our view, constitutes a judicial determination that in order to effectuate the purpose of the legislation, a statute which specifically authorizes recovery of attorneys' fees in the trial court ordinarily should be interpreted as authorizing recovery of such fees on appeal. For example, in Morcos v. Board of Retirement, supra, the Supreme Court determined that Government Code section 31536, the attorney fee statute there in question, "was enacted to correct the disparity between private individuals living on reduced or fixed incomes who seek to recover their pension benefits versus the government entities which employ their own 'house' counsel. Construing section 31536 to permit a successful claimant to recover attorney fees incurred during the appellate process furthers this legislative intent. The relative parity between the government entity and the successful applicant that section 31536 was intended to achieve would be lost if the government were free to pursue appellate review with its own counsel while the applicant is forced to incur nonrecoverable fees in defending the trial court's decision." (Morcos v. Board of Retirement, supra, 51 Cal.3d at pp. 929.)

In accordance with the foregoing authority, we conclude plaintiff is entitled under Code of Civil Procedure section 1021.1 to recover his attorneys' fees on appeal. Our conclusion is consistent not only with the above-quoted general principle but also with the purpose of Code of Civil Procedure section 1021.1 which is "to reduce court congestion" by, among other things, encouraging "the early settle-

ment of cases." (See, Stats. 1987, ch. 1003, § 3, pp. 3359-3360.) In our view, the statutory purpose of reducing court congestion is promoted by interpreting Code of Civil Procedure section 1021.1 to include an award of attorneys' fees incurred on appeal. Liability for attorney's fees incurred not only in the trial court but also on appeal increases the incentive to settle cases early thereby reducing court congestion.

Accordingly, we conclude where, as here, a party is awarded reasonable attorneys' fees in the trial court under Code of Civil Procedure section 1021.1 and the judgment (including, when challenged, the attorney's fees award) is affirmed on appeal, that party is entitled to an award of reasonable attorneys' fees incurred in responding to the appeal. Such fees are recoverable in the trial court in accordance with the procedure for recovering costs on appeal. The trial court has discretion to determine the reasonable amount of the attorneys' fees to be awarded and shall exercise that discretion in accordance with Code of Civil Procedure section 1021.1, subdivision (d).

CONCLUSION

In undertaking our review of the numerous and extensive issues raised by defendants in this appeal, we initially were struck by defendants' apparent inability to appreciate that a jury might view the various allegations of plaintiff's complaint and the evidence pertinent thereto in a manner adverse to defendants. In the trial court, defendants adhered steadfastly to the position that defendants' actions, in all respects, were proper. The jury, as evidenced by its verdict, obviously reached a different conclusion, as did the trial court, as evidenced by its denial of defendants' post-trial motions. Although defendants' trial court stance arguably could be characterized as advocacy, we do not fully comprehend defendants' adherence to that stance in this appeal. In other

words, despite, what in our view, was an unequivocal message from the jury, defendants on appeal not only persist in their trial court assertions, but now also blame the trial court for their apparent lack of success.

On appeal, defendants compound the tactical error we believe they committed in the trial court not only by effectively requesting this court relitigate the entire dispute, but also, as the foregoing discussion reveals, perhaps ad nauseam, by failing to demonstrate adequately that error cognizable on appeal occurred in the trial court.

In summary, we conclude, for the reasons discussed above, the entire general damage verdict is supported by the jury's liability and damage findings, as disclosed by the jury's responses to the pertinent special interrogatories, in connection with plaintiff's causes of action for defamation and breach of the implied covenant of good faith and fair dealing. To the extent defendants purport to challenge either of the jury's findings in connection with those two theories of recovery, we conclude those challenges either are substantively meritless or procedurally defective. For the same reasons, we reject defendants' other claims of error in this appeal.

DISPOSITION

The judgment is affirmed in its entirety. Plaintiff to recover reasonable attorneys' fees and costs on appeal.

/s/ McKinster
J.

We concur:

/s/ Ramirez
P.J.

/s/ McDaniel
J.*

*Retired Associate Justice of the Court of Appeal, Fourth District, senior judge status (Gov. Code, § 75028.1), sitting under assignment by the Chairperson of the Judicial Council.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on April 15, 1994, I served the within *Appendix to Petition For Writ of Certiorari (Volume ____ of ____)* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(*By Express Mail: Original and 40 Copies*)

Clerk, California Court of Appeal
Fourth Appellate District
Division Two
303 West Fifth Street
San Bernardino, California 92401

Clerk of the Superior Court
for the County of Riverside
Honorable John P. Carroll, Judge
County Courthouse
4050 Main Street
Riverside, California 92501

Clerk of the Superior Court
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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 15, 1994, Los Angeles, California.

Betty J. Malloy
(Original Signed)